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In the Supreme Court of the United States

OCTOBER TERM 1970

70-116

DONALD A. DOWELL,
Petitioner

v.

BEECH ACCEPTANCE CORPORATION, INC.
NEVADAIR COMPANY,
NORMAN LARSON COMPANY,
Respondents

PETITIONER'S APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

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APPENDIX

PERTINENT PROVISIONS OF THE FEDERAL AVIATION ACT OF 1958

Title 49 of the United States Code

§1301. Definitions.

As used in this chapter, unless the context otherwise requires --

(17) "Conveyance" means a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property.

§ 1403. Recordation of aircraft ownership.

(a) Establishment of recording system. The Administrator shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States:

(2) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any specifically identified aircraft engine or engines of seven hundred and fifty or more rated takeoff horsepower for each such engine or the equivalent of such horsepower, or any specifically identified aircraft propeller capable of absorbing seven hundred and fifty or more rated take off shaft horsepower, and also any assignment or amendment thereof or supplement thereto:

(3) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under §1424 (b) of this title for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such an air carrier, which instrument need only describe generally by types the engines, propellers, appliances, and spare parts covered thereby and designate the location or locations thereof; and also any assignment or amendment thereof or supplement thereto.

(b) Recording of releases, cancellations, discharges, or satisfactions.

The Administrator shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge, or satisfaction relating to any conveyance or other instrument recorded under said system.

(c) Validity of conveyances or other instruments; filing.

No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare

parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator: Provided, That previous recording of any conveyance or instrument with the Administrator of the Civil Aeronautics Administration under the provisions of the Civil Aeronautics Act of 1938 shall have the same force and effect as though recorded as provided herein; and conveyances, the recording of which is provided for by subsection (a)(1) of this section made on or before August 21, 1938, and instruments, the recording of which is provided for by subsections (a)(2) and (a)(3) of this section made on or before June 19, 1948, shall not be subject to the provisions of this subsection.

(d) Effect of Recording.

Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation, except that an instrument recorded pursuant to subsection (a) (3) of this section shall be effective only with respect to those of such items which may from time to time be situated at the designated location or locations and only while so situated: Provided, That an instrument recorded under subsection (a) (2) of this section shall not be affected as to the engine or engines, or

propeller or propellers, specifically identified therein, by any instrument theretofore or thereafter recorded pursuant to subsection (a) (3) of this section.

(e) Form of conveyances or other instruments.

Except as the Administrator may by regulation prescribe, no conveyance or other instrument shall be recorded unless it shall have been acknowledged before a notary public or other officer authorized by the law of the United States, or of a State, territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.

(f) Index of conveyances and other instruments.

The Administrator shall keep a record of the time and date of the filing of conveyances and other instruments with him and of the time and date of recordation thereof. He shall record conveyances and other instruments filed with him in the order of their reception, in files to be kept for that purpose, and indexed according to --

(1) the identifying description of the aircraft engine, or propeller, or in the case of an instrument referred to in subsection (a) (3) of this section, the location or locations specified therein, and

(2) the names of the parties to the conveyance or other instrument.

(g) Regulations.

The Administrator is authorized to provide by regulation for the endorsement upon certificates of registration, or aircraft certificates, of information with respect to the

ownership of the aircraft for which each certificate is issued, the recording of discharges and satisfactions of recorded instruments, and other transactions affecting title to or interest in aircraft, aircraft engines, propellers, appliances, or parts, and for such other records, proceedings, and details as may be necessary to facilitate the determination of the rights of parties dealing with civil aircraft of the United States, aircraft engines, propellers, appliances, or parts.

(h) Previously unrecorded ownership of aircraft.

The person applying for the issuance or renewal of an airworthiness certificate for an aircraft with respect to which there has been no recordation of ownership as provided in this section shall present with his application such information with respect to the ownership of the aircraft as the Administrator shall deem necessary to show the persons who are holders of property interests in such aircraft and the nature and extent of such interests.

PERTINENT PROVISIONS
OF THE CALIFORNIA COMMERCIAL CODE

§2403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting".

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) The transferor was deceived as to the identity of the purchaser, or

(b) The delivery was in exchange for a check which is later dishonored, or

(c) It was agreed that the transaction was to be a "cash sale," or

(d) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession for the purpose of sale, obtaining offers to purchase, locating a buyer, or the like,

regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

§9307. Protection of Buyers of Goods. (1) A buyer in ordinary course of business (subdivision (9) of Section 1201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

§1201(9). "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawn broker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DONALD A. DOWELL
Plaintiff

v.

MARION TANGER,
BEECH ACCEPTANCE CORPORATION, INC.,
NEVADAIR COMPANY,
AND THE NORMAN LARSON COMPANY,
Defendants

SOC - 14279
(Consolidated with No. 894539)

December 6, 1967

HON. ROBERT H. PATTON, Judge

THE COURT: Any case such as this, that involves serious questions of statutory construction and the respective constitutional powers of the federal government and the state, should really have a formal, written opinion by the trial judge, I think, explaining to the parties, at least, and to such of the reviewing courts as would like to know his reasons for his decision; not that they are governed by it at all. But it enables them to find the point at which to level the guns of their

jurisprudence.

However, since my vacation time for the year begins next week, I think it would be an imposition on the parties to hold the case under submission for such a length of time as would require me to--permit me, rather, to have my vacation and then write a formal opinion.

So, bearing in mind that I have extreme difficulty in expressing myself clearly in sound legal language extemporaneously, and bearing in mind that if the case is taken up on review that you will both have to do a lot of work in placing an issue of this importance clearly before the courts of review, all I can do is to give you an outline of the general principles on which I will decide the case here at this trial court level.

Our main problem, as both the lawyers well recognize here, is to determine the extent to which the Congress by the adoption of the Federal Aircraft Registration Act has occupied the entire field of law governing the rights of parties to aircraft. Apparently because of the obvious practical necessity of having some central place of registration for aircraft, the courts apparently have not tried to comb with a fine tooth comb the decisions that might question the, or put limitations upon the power of the Congress to entirely supplant state law in any field such as this.

I have no doubt but what if cases of this kind ever go to the Supreme Court of the United States, that they will find that under the general power of Congress under the Constitution with respect to interstate commerce that a central system of registration is constitutional, but I have no doubt at all that our Supreme Court of the United States will not say that Congress by occupying the field with respect to registration of aircraft or any other kind of property will totally oust the states from their right to govern the personal obligations between parties who happen to have some connection with an airplane which has been validly registered with the Federal Aviation Authority back in Oklahoma City, because Congress has supplied no alternative law to regulate the personal conduct of the parties with respect to the transaction. They merely provided a method for establishing priority among different claimants, different claimants to ownership and different claimants to security interest. That is not enough.

How do you pay a debt which is secured by a federally registered mortgage or conditional sales contract? You have to pay it to some agent of the corporation. Well, who is an agent of the corporation? Suppose that you pay the president of the corporation. Does Congress mean to say that because you have a rule in your own bylaws, that the president of Beech Acceptance Corporation has no authority to accept payment, that the customer is bound

by that? Congress would have to supply some other way of affording a means of making payment.

What about the state law of estoppel? Suppose that the president of the greatest airplane manufacturer in the world says to a potential buyer, "There are no liens on this property except one. That belongs to my company. Just pay me the purchase price, and that will be discharged." Do you mean to say that Congress intends not to have the old-fashioned common law and state law of estoppel apply with respect to the president of a corporation who assures a customer that he is doing business in such a manner as will give him good title to the airplane? I think not.

What about the state law with respect to payment? It has been the law for hundreds of years that if you do owe an obligation, that you can discharge it by what in common law was called payment.

Now, Congress has a right to say what is legal tender for payment, but Congress hasn't told us in this act who you make payment to. The common law and the statutes say you make payment to a representative of the person who owns the obligation.

Well, do you say, "But this is something that the customer has to worry about himself?" No. The common law and the state law do not say that and, since Congress has not clearly at least indicated its intent

to supplant all of the state law with respect to estoppel, agency and payment, and has provided no alternative law to guide the courts of the state in determining those questions, I am going to hold that the Congress did not intend to supplant the law of California or the law of any other state for that matter with respect to the personal obligations that arise between the parties who may deal with the property that is, nevertheless, subject to a valid registration back in Oklahoma City.

Now, what do the cases say so far on this subject? In the Pope case there was no disregard or overruling or ousting of the state law by that decision. Now, the District Court of Appeal in the broadness of its language did indicate that more than simple registration was governed by the Federal Registration Act. And I want the record to show that there is no intention on the part of this trial court to disobey the injunction laid on us by the Supreme Court of this State in the equity case which held that it is our business to follow the decisions of the District Court of Appeal and not to question them or to criticize them.

If the decision in the Pope case had involved the question of estoppel or the question of agency or the question of payment, I would follow it implicitly regardless of the fact that I believe that Congress has no power to occupy those fields to the exclusion of a state.

With respect to the Atlas Services case, they came closer still to intimating that in their opinion the registration act of Congress should be solely looked to to govern the respective rights of the parties. But even there there was no ousting of state law. There was no principle of state law involved that would be in conflict with that ruling.

It has never been the common law or the state law of California that someone does not have to suffer when there are two completely innocent persons to a third party's fraud.

Take, for example, the Pope case. If either of you lawyers had paid substantial sums of money to join, let us say, the California Club, and the California Club was subject to a mortgage held by the Bank of America, you couldn't complain under our state law that when the Bank of America foreclosed on its mortgage you had to get out of your club. It is just as simple as that. That has always been the law.

But suppose that the aircraft company had itself promoted and put in operation the club and encouraged all these members to join it and had assured them that "if you pay your membership to this club, you will be protected for five years." I haven't the slightest doubt but what the State of California and--both the laws of the State of California and the federal laws, too, would estop that aircraft manufacturer from forcing those men out of the

airplane because they had themselves encouraged them to join.

I have no doubt in the Atlas case that if the owner, the true owner, the company that owned the lien or the title, if the title was not encumbered, had told this mechanic, "Put in this new aircraft engine; we will pay you," that the law would have been that they are estopped then to rely on their prior mortgage to beat that man out of the price of his engine.

But there was no such estoppel in that case. The people who had the mortgage or the basic title to the airplane didn't order that engine in. It was tough that somebody had to lose. So the law let the law of priority take its course. So much for the decisions of the State of California.

The federal courts have treated our specific subject only twice. That is, with respect to the rights of a purchaser on the open market or any other situation in which the state law of estoppel, agency or payment would be involved.

The case that both of you realize is closer to our picture than any other and is, in my opinion, precisely identical, in legal concept, at least, is the case of Texas National Bank of Houston vs. Aufderheide. That's in 235 Fed. Supp. The case has been completely analyzed by both of you lawyers. You know precisely what it held.

A Federal District Court decision is not binding, of course, upon this court, but it is certainly very persuasive as to what the federal law is in this particular field.

It also indicates that it didn't ever occur to Judge Henley of Texas that Congress ever intended to throw the common law of Texas expressed in that Corpus Juris quotation out the window.

It would have been better for our purposes, of course, if you had an extended law review treatment on both sides, by the fellow who was upholding the lien and the fellow who was upholding the rights of the purchaser, but the basic tenor of the case is pretty clear. The fact that Judge Henley refers to the comparability of the position of the purchaser of an automobile or television set or any other article of commerce that is actually displayed for sale by a merchant in the regular course of business must be protected against prior mortgages.

In the second case, the State Securities case in 355 Fed. 2d, there appears to be no reason at all why the court became involved in our problem because there was no prior mortgage recorded at all. But it, nevertheless, is an authority in this sense: That it is a great court of the United States, the second highest that we have in our land, the Circuit Court for the Tenth District, and they expressed their opinion. It is not a decision on

this point, but it is their point that the state law of estoppel--and they mentioned it by name--is not ousted by the adoption of the Federal Registration Act. I will treat it only as I would treat a learned law review article appearing in the Law Review of the University of California, let us say, signed by those gentlemen of the Tenth Circuit Court of Appeal and, as such, it is entitled to a lot of consideration before I would dream of disregarding their opinion, all of them federal judges of the second highest rank, and they say that the state law of estoppel is not ousted.

It should be borne in mind when this case is reviewed, if it is--and it is important enough to be reviewed--that the doctrine of estoppel never did attack the validity of the prior mortgage or the prior title of someone whose property was exposed for sale. They say, of course, the mortgage was legitimate if used in the normal way. But you folks, you particular mortgagees consented to this particular merchant putting these goods on display. That is where the consent that Judge Henley was talking about comes from.

There was no question that the mortgage company in that case did not say in so many words that "we consent to you selling this property, this plane free and clear of our mortgage." The consent is necessarily implied from the fact that it put it on the open market.

Now, that principle is older than the United States Constitution. It is older than our Uniform Commercial Code. It is so old that there is no known record of its origin. In the common law it was called the principle of the market overt. If the true owner of any kind of goods at all permitted the goods to be sold on a market overt, the purchaser of those goods for value got good title. The common-law lawyers didn't even resort to such legalisms as ostensible agency or estoppel. They just said if you walk up to an open market and buy a piece of goods, you get title ipso facto. It was that cold and that clear. And a market overt was limited, but every store in London--they called them shops--every shop that contained goods for sale was an open market as to the goods that it customarily dealt in.

For example, if a jeweler would sell a horse, the customer was not protected by the rule of open market because he had no right to assume that the jeweler had the right to sell a horse. But if he sold a jewel--and oftentimes in the common law days jewels and gold in amounts equal to the price of our airplane were sold in that fashion, and the title was confirmed by the common law.

Now, in the United States, and particularly California, we articulate that principle in little more detail. In other words, we defend it. We defend it on the ground of estoppel. And that estoppel is, I think, best outlined in California in the case of the Commercial Credit Corporation

vs. Barney in 10 Cal. 2d 718 where it says that the owner or the lienholder--it doesn't make any difference which--and for this reason I am not distinguishing between Beech Aircraft Company and Beech Acceptance Company, because both of them consented to the placing of the plane on the open market, in the place of business of an open merchant dealing in that particular product--so both the owner and the lienholder are bound by that act of putting the indicia of ownership, and the possession, and all the trappings that go with the ordinary power of retail sale, all in the hands of Mr. Tanger. That is the act which estops them from relying on their valid mortgage. And I want the record to show that I treat the mortgage as being valid, but they are estopped to rely upon it.

But, further than that, they have placed in the hands of Mr. Tanger an agency, an agency to sell, of course, which they admit, but, more than that, an agency to accept payment. By placing the title of authorized dealer above the name of Mr. Tanger, above his shop, and in the advertising, in my opinion, there is no doubt whatever but that they thereby constituted him their agent to accept payment of the very mortgage upon which they rely.

Take an analogy. In a very recent case our District Court of Appeal, or the Supreme Court of this State, has held that an insurance company that writes a policy of group insurance for an employee and

tells the employer, "You collect the premiums and pay them to us," thereby makes the employer their agent for the collection of the premiums; and if he should default in paying the premium, then, to the company, the customer's, nevertheless, protected because they have made him their ostensible agent for collection.

I think that is going far, far more to the left, let us say, of our particular principle than the idea that authorized agent dealing in automobiles, locomotives or aircraft is authorized to accept payment on behalf of whom? On behalf of not only the owner who constitutes him the agent but also on the part of the mortgagee who let him also have possession of the automobile or the aircraft for purposes of sale. Remember that all payment has to go through the hands of some agent. Even the president of the corporation is at law an agent of the corporation for some purposes. The treasurer is agent for some purposes. The authorized agent is agent for some purposes.

Therefore, it will be my ruling that the payment by the ultimate purchaser to Mr. Tanger did constitute payment of the purchase price in full. And that is an additional ground for the judgment over and above my finding that both the aircraft manufacturing company and the aircraft financing company are estopped to rely upon their valid prior mortgage.

And, again--and this will be in conclusion. I don't want to drag this out unnecessarily--if the case is reviewed, I think the reviewing courts should have it called to their attention that the mere knowledge of the existing lien is no solution to the problem at all.

Suppose the purchaser does call the federal registry authorities and does find out that there is a lien; what in the normal course of American trade will happen? The dealer will say, "Well, of course there is. That is our flooring plan."

"Well, what do I do about that?", says the customer.

The dealer says, "Well, just pay it here. It will be discharged, and you will get your title papers through the mail in due course."

There is no way that the customer can conceivably protect himself. Knowing that there is a lien and paying it he would still not have protection if the theory of the aircraft financing company is to be maintained in this case.

Sometimes on review, while the reviewing courts may have no inclination whatsoever to defer to our opinions as to the basic law, they often are very considerate of our practical knowledge of the way business is done. So I hope that that is

called to their attention if this case goes up: That there is no practical way for the customer to protect himself. In fact, in the absence of title insurance companies or escrow companies located exactly in Oklahoma City so that they will be able to provide simultaneous release and re-recordation of the new instruments, the Bank of America would not be able to protect itself by merely calling Oklahoma City. It would find out that at the particular time of that call there is no lien. The lien could be filed 15 minutes later. They could take their lien and attempt to get it on record that same afternoon, and they would be helpless.

So, there are very practical reasons, I think, for holding, first, that Congress had no intention to oust the state courts of all of their jurisdiction over those multiplicity of personal problems that go after recordation and that are not solved by recordation. And you will find that even though the federal courts have recognized that the Congress did attempt to occupy the entire field of labor-management relations, for example, a long time before they tried to occupy this particular field, they found there were some things that Congress must be assumed to have left to the states, such as a battery or an assault or a murder committed on the picket line. I am no speech maker for the doctrine of states' rights, generally. The doctrine of states' rights has fallen into some scholastic disrepute of recent years

because of its abuse by states who wanted freedom to do acts which the general consensus of legal opinion was to the effect that they should not be permitted to do them.

Here, however, we have the noblest purpose that a state can fulfill--the protection of its own customers in the ordinary course of business. And I don't think that the courts of the United States are ever going to say, in the first place, that it was Congress' intention to oust that. If they did, then they will have to seriously consider whether or not Congress had the power.

Very well, gentlemen. You tried a beautiful case. You presented all of the evidence that could possibly be presented on the point as far as I can see. And the issue is clear, and you both understand it well. So I think there is nothing I can add except to give judgment for the plaintiff or decreeing that the title to the aircraft does belong to Mr. Dowell, and that the defendant will be ordered to execute the necessary papers to clear title in his behalf.

THE CLERK: Judge, there are plaintiffs and cross-complainants and ---

THE COURT: Plaintiff Dowell ---

THE CLERK: Against ---

THE COURT: -- against the defendant Beech Acceptance Corporation. Is there any other defendant involved here that we need to cover?

MR. BERNARD: I don't believe so insofar as title to the aircraft is concerned. There were other defendants on the fraud-conspiracy claim that I represent.

MR. FORDE: Plaintiff Dowell's action was against Beech, Tanger and Nevadair and Larson Company.

THE COURT: Well, I will have to find that you are not damaged by Mr. Tanger. So the judgment will have to be in favor of Mr. Tanger on the complaint of Mr. Dowell against Mr. Tanger because of the lack of damage.

There will also be a judgment for loss of use in favor of Mr. Dowell as against Beech Acceptance Corporation and the distributor--is the distributor a named defendant here?

MR. FORDE: Yes. In the Nevadiar ---

THE COURT: The people involved ---

MR. FORDE: We named the Norman Larson Company, too.

THE COURT: Well, Norman Larson Company appear? Are they represented?

MR. FORDE: Yes.

THE COURT: I'd have to give a judgment for loss of use as against the people who ---

THE CLERK: Mr. Bernard represented all parties on that subject.

THE COURT: The loss of use problem is a difficult one. These parties acted in good faith to this extent: That they believed they were within their legal rights, and they had the advice of counsel. But there was, in the manner of it, complete disregard for the potential rights of the customer. I don't feel that this calls for a serious punitive damage, but there must be some penalty attached to an act which, I think, is as oppressive as this. It is not fraudulent, but it is oppressive. They meant well, but they were in the legal wrong.

The actual damage for loss of use I can find only to be in the amount of $175, which happens to be the monthly interest on $30,000, but that is totally inadequate, obviously, to make up for the actual loss that the customer sustained. And the only theory upon which I can make up to Mr. Dowell that terrible burden that has been put on him by this is to allow some amount of punitive damages. I am going to allow punitive damages in the amount of $1,000.

THE CLERK: Is that still against the same party? Who is to pay the $1,000?

THE COURT: These are the three corporations who participated in the repossession. Now, let me be sure who they are. Beech Acceptance Corporation, Nevadair and Norman Larson Company. Was there a representative? I don't rely upon my memory on these things, gentlemen. I know there were representatives of Nevadair and of Beech Acceptance. Was there a representative of Norman Larson?

MR. BERNARD: Well, Mr. Cote was there, and he was an officer of both companies. But ---

THE COURT: Norman Larson should be ---

THE CLERK: Is that divided equally among the three?

THE COURT: It is just a general judgment against the three, jointly and severally against the three.

THE CLERK: Did you give an amount for the use ---

THE COURT: Actual damages $175. That is against these three. Punitive damages in the amount of $1,000.

I think that covers it, gentlemen.

ME. BERNARD: Your Honor, Curtis K. Ward was a defendant in the case. He is an employee of Beech Acceptance Corporation.

Are you finding in favor of Curtis K. Ward?

THE COURT: Yes. He was an agent who was obviously acting on behalf of his corporation at all times. There was nothing that he did that was a personal tort to anybody that I can see. Do you have any ---

MR. FORDE: No. I didn't join him in my action. He was in the other action.

MR. BERNARD: I thought ---

MR. FORDE: No. I didn't join him.

THE CLERK: Who was the plaintiff against Ward?

MR. BERNARD: I was mistaken. I thought he was a defendant. He is a cross-defendant in the Rose action, which has been settled.

THE COURT: Will you folks cooperate. I don't expect you to be agreeing with this.

THE CLERK: Who is going to prepare the judgment?

THE COURT: Mr. Forde will have to do it.

THE CLERK: Mr. Forde. Prepare the findings of fact and conclusions of law and judgment.

MR. FORDE: I assume you want findings, counsel?

MR. BERNARD: Yes, sir.

MR. FORDE: All right. Then this will be, just be on this case. The other case ---

THE CLERK: It is consolidated.

MR. FORDE: This will be on this case, and then what about the findings in the other matter with Mr. Tanger?

MR. BERNARD: We haven't resolved ---

THE CLERK: Mr. Bernard is preparing that. That is what was said in chambers.

THE COURT: You will have to prepare the judgment as against Tanger.

MR. BERNARD: How does Your Honor wish me to prepare that? I suppose it will all be ---

THE COURT: I thought that was assumed when you and Mr. Cowan left. The judgment was in your ---

MR. BERNARD: Will it be a finding ---

THE COURT: But first we haven't a judgment in that case because it is under submission. You are going to give me the amount that you want.

MR. FORDE: So then I would prepare, Your Honor, this judgment separately based on your findings now.

THE COURT: Yes. That's right. This rule about there only being one judgment in a case only applies between the same parties. Your judgment will go as soon as you can get it prepared, and Mr. Bernard --

MR. FORDE: Right.

THE COURT: -- can have his cracks at the findings of fact and conclusions of law and all that.

MR. BERNARD: Only one matter, Your Honor, that I would like to point out just for the record. I think Your Honor stated that both counsel rely on the Texas case. I merely wanted to point out ---

THE COURT: I didn't mean that. I meant both parties had analyzed the Texas case and understand it. I realize that. If we have any reliance in there, I will take it out of the record. You didn't rely upon it. You distinguished it.

MR. FORDE: Thank you very much, Your Honor.

MR. BERNARD: Thank you, Your Honor.

(Court adjourned at 3:59 P.M.)

IN THE
COURT OF APPEAL, SECOND DISTRICT
STATE OF CALIFORNIA

CIV. 33634

DONALD A. DOWELL,
Plaintiff & Respondent

v.

BEECH ACCEPTANCE CORPORATION, INC.,
NEVADAIR COMPANY,
AND THE NORMAN LARSON COMPANY,
Defendants & Appellants

February 24, 1970

KAUS, Presiding Justice.

The defendant, Beech Acceptance Corporation, Inc., ("Beech"), appeals from a judgment declaring the plaintiff, Donald A. Dowell, to be the owner and entitled to possession of a certain Beechcraft Bonanza aircraft, Federal Aviation No. N-2041W. The same defendant and defendants Nevadair Company ("Nevadair") and Norman Larson Company ("Larson") also appeal from the portion of the judgment against them which awards plaintiff $175.00 compensatory and $1,000.00 punitive damages.

The relevant facts are not in dispute. The plane in question was sold by the

manufacturer to Nevadair, one of its distributors. On October 26, 1965, Nevadair made a conditional sale of the plane to one Tanger, a duly authorized Beechcraft dealer. Under the terms of the sale Tanger was not to sell the plane without Nevadair's consent. At the same time Nevadiar assigned its security interest to Beech. Beech knew that Tanger held himself out to the public as an authorized Beechcraft dealer and that the plane would be offered for sale to the public. On October 27, 1965, Beech filed the contract and the assignment to it with the Federal Aviation Agency ("F.A.A."). (49 U.S.C. §1403.) On November 4, 1965, the F.A.A. recorded the instruments. In July 1966 plaintiff purchased the plane from Tanger for $30,000.00 which he paid in full. He took delivery on July 19. Plaintiff had no knowledge or notice of Beech's security interest. He made no inquiry of Tanger, "because [Tanger] was an authorized representative of the Beech Corporation and I knew that they would back him if he didn't make good, so I gave him a check for thirty thousand dollars." Plaintiff had previously bought a plane from an individual, on which occasion he had checked on the title with the F.A.A. He knew that as a member of the Aircraft Owners and Pilots Association he could, for the cost of three dollars and fifty cents, obtain a telephonic report on the title of an aircraft from the F.A.A. His stated reason for failing to do so was: "In my lifetime I have purchased 25 cars from General Motors, from authorized

franchised dealers, and never questioned their ability to, or legal right to sell me that automobile or worry about General Motors coming and stealing it out of my garage." Tanger promised that he would file plaintiff's bill of sale with the F.A.A. Aircraft Registry in Oklahoma City, but failed to keep his promise.

At the time of the sale to plaintiff, Tanger owed Beech more than $20,000.00 on the plane. On September 22, 1965, he confessed to Beech that it had been sold to plaintiff. On September 23 Beech, Nevadair and Larson--Nevadair's parent corporation--removed the aircraft from plaintiff's possession without his knowledge or consent. They acted on advise of counsel. Plaintiff then brought this claim and delivery action for the return of the plane or, alternatively, its value. He also sought damages for loss of use and punitive damages. By use of the provisional remedy (Code Civ.Proc. §509) plaintiff regained possession on October 22, 1966. It will be noted that all relevant transactions took place after the effective date of the Commercial Code, January 1, 1965. (Comm. Code, §10101.)

The principal issue on this appeal is whether the system of recording interests in aircraft first established in the Civil Aeronautics Act of 1938, and carried forward into the Federal Aviation Act of 1958, affects priorities recognized by applicable state law. The problem is squarely before

us, because there can be no question that, absent the federal recording system and its possible impact on state law, Tanger had the power to defeat Beech's security interest by a sale to a buyer in the ordinary course of business and that plaintiff was such a buyer.[1] (Comm.Code, §§ 2403, 9307.)

Put differently, the question is whether a buyer in the ordinary course of business, who would receive an unencumbered title even though the holder of a security interest has perfected his interest by a proper filing in accordance with section 9401 et seq. of the Commercial Code, takes subject to such security interest simply because Congress has said that recordation with the F.A.A. shall be "valid as to all persons without further or other recordation." (49 U.S.C.A. §1403(d).)

Section 2403 reads in relevant part as follows: "(1) A purchaser of goods acquires all title which his transferor had or

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[1]Section 1201(9) of the Commercial Code reads, in relevant part, as follows: "'Buyer in ordinary course of business' means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind...." (Henceforth, unless otherwise noted, all code references are to the Commercial Code.)

had power to transfer ... (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business...." More specifically, a pertinent part of section 9307 says: "(1) A buyer in ordinary course of business (subdivision (9) of Section 1201) ... takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence...." Both the Uniform Commercial Code Comment and the California Code Comment indicate that section 9307 means precisely what it says. The former says: "... This Section provides that such a buyer takes free of a security interest, even though perfected, and although he knows the security interest exists. Reading the two provisions together, it results that the buyer takes free if he merely knows that there is a security interest which covers the goods but takes subject if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party." The Californis Code Comment contains the following: "Subdivision (1) continues the rule under prior California law to the effect that a person who buys goods in the ordinary course of business in good faith and without knowledge of a security interest takes the goods free of the security interest." (West's Ann.U.Com.Code, §9307, p. 501.)

Before discussing the possible effect of the Federal Aviation Act, one false issue should be disposed of. Section 9104 provides as follows: "... This division does not apply (a) To a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; ....." This section does not make the Commercial Code irrelevant, since the very question under consideration is the extent to which federal statutory law governs the rights of the parties who have created the security interest and a third party.[2]

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[2]With respect to section 9104(a) the Uniform Commercial Code Comment reads, in part, as follows: "Where a federal statute regulates the incidents of security interests in particular types of property, those security interests are of course governed by the federal statute and excluded from this Article. The Ship Mortgage Act, 1920, is an example of such a federal act. Legislation covering aircraft financing has been proposed to the Congress, and if enacted, would displace this Article in that field. The present provisions of the Civil Aeronautics Act (49 U.S.C.A. §523) [sic] all for registration of title to and liens upon aircraft with the Civil Aeronautics Administrator and such registration is recognized as equivalent to filing under this Article (Section 9--302(3)); but to

The federal recording provisions were first enacted as part of the Civil Aeronautics Act of 1938. In 1958 they were

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the extent that the Civil Aeronautics Act does not regulate the right of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this Article, pending passage of federal legislation." (Emphasis added.) The California Code Comment reads, in part, as follows: "With reference to security interests subject to federal statute, see Official Comment 1. Other security interests which are to some extent covered by federal statutes include those created in aircraft (49 U.S.C.A. §1403), railroads (49 U.S.C.A. §20), patents (35 U.S.C.A. §261), and copyrights (17 U. S.C.A. §§ 18,20). It is not clear whether they would require an exclusion of security interests from coverage by the Commercial Code. The language of Official Comment 1 by analogy would not appear to require an exclusion...." (West's Ann.U.Com.Code, §9104, p. 347.) In Project, California Chattel Security And Article Nine Of The Uniform Commercial Code, 8 U.C.L.A. L.Rev. 806, 830-831, the authors state: "Where a security interest is subject to a federal statute which regulates the rights of parties thereto, it is excluded from the scope of the Code .... The exclusion, however, is limited in that it applies only 'to the extent' to which federal law governs, thereby permitting reference to the Code when federal law, possibly due to the statute's

reenacted, without substantial change as part of the Federal Aviation Act of that year. Insofar as they are relevant to this litigation, they read as follows: "(a) The Administrator shall establish and maintain a system for the recording

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lack of comprehensiveness, fails to provide a solution to a given problem.... The Code refers to the Ship Mortgage Act of 1920, ... which regulates security interests in maritime equipment, as an example of the type of federal statute which would require an exclusion. Other forms of security interests which are to some extent governed by federal statutes include those created in aircraft, ... railroads, ... patents ... and copyrights.... These statutes, however, are primarily directed at providing adequate means of recording such security interests and provide little in the way of regulations with respect to rights of the parties to, and third parties affected by, the security agreements. It is therefore not clear whether these statutes would require an exclusion of such security interests from the coverage of the Code...." Of course, as far as the recording of security interests is concerned--as distinguished from the question of priorities--section 9302(3)(a) specifically exempts from the filing provisions of the Commercial Code all security interests "in property subject to a statute of the United States which provides for a national registration or filing of all security interests in such property."

of each and all of the following: (1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States; ... (c) No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, ... against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator ... (d) Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) ... of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation ...." (49 U.S.C.A. §1403(a)(1), (c), (d).)

The legislative history of the 1958 Act sheds little light on the purpose of the recording provisions embodied in section 1403 of 49 U.S.C.A. More illuminating is the legislative history of the 1938 Act.

The Civil Aeronautics Act was derived from two bills introduced in the third session of the 75th Congress: H.R.9738 and S.3845. The House bill (H.R.9738) was submitted by Representative Lea of California on March 4, 1938. The recording provisions of the bill as introduced were ultimately enacted without modification in

any material particular.[3] Hearings were held on the Lea bill before the Committee on Interstate and Foreign Commerce of the House. The reasons for the recording provisions were stated in the testimony of Fred D. Fagg, Jr., who was Director of the Bureau of Air Commerce and Secretary of an Interdepartmental Committee, organized by the Secretary of Commerce at President Roosevelt's request. As related by Mr. Fagg, the objective of providing for federal recording of interests in aircraft was to simplify the task of ascertaining what claims, if any, exist with respect to a particular airplane. Because of the great mobility of aircraft and the burden of searching titles, a person holding an interest in a plane could have recorded it in virtually any jurisdiction in the country, while the plane was located temporarily there, so that a prospective purchaser or lienor would be forced to search the records of every jurisdiction in order to ascertain the state of the title; the situation was further complicated by the peculiarities of the recording acts of the individual jurisdictions.[4] In all of the testimony and letters

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[3]Compare H.R.9738 as originally introduced (9 J.Air.Law 296, 323) with section 503(b) of the Civil Aeronautics Act of 1938 (52 Stat. 973, 1006).

[4]Hearing on H.R.9738, before the Committee on Interstate and Foreign Commerce, 75th Congress, 3rd Session, pages 405-407.

of twenty-seven witnesses there is no indication that the recording provisions of the bill were intended to establish a set of priorities to supersede those existing under the various state laws.

There was a very short committee hearing on S. 3845, introduced by Senator McCarran, but it was not officially reported.[5] The Senate Committee on Commerce reported the bill out with a recommendation that it be passed with certain amendments.[6]

All the amendments were adopted by the Senate, but only one is important for our purposes: As originally proposed, section 502(d) of the McCarran bill provided, in part, that "Every instrument so recorded [with the C.A.A.] shall have priority over all other claims arising after July 1, 1939, against the aircraft subject thereto." (Emphasis added.) This language, which possibly could have nullified all inconsistent state laws concerning priorities of security interests, was struck out by the amendment adopted by the Senate.[7] As

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[5]Charles S. Rhyne, The Civil Aeronautics Act Annotated (1939, National Law Book Co., Washington, D.C.) page 60, footnote 215.

[6]S.Rept. No. 1661, 75th Cong. 3d Sess., April 20, 1938.

[7]83 Cong.Rec. 6757 (May 12, 1938).

amended and as ultimately passed by the Senate[8] and House,[9] the recording provisions were the same in substance as the parallel provisions of the 1958 Act.

It is manifest, therefore, that the legislative history of the Civil Aeronautics Act gives no support to the proposition that the recording provisions of the Act were designed to nullify state laws not inconsistent therewith.[10] In fact, the circumstantial evidence is to the contrary.

A most relevant expression of congressional intent and administrative interpretation on the issue which concerns us came during a hearing which eventually led to the enactment of section 1406 of 49 U.S.C. A. in 1964. That section reads as follows: "The validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified herein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified. ..." A similar statute had been proposed by Representative John V. Lindsay of New York in 1962, but failed of enactment. In

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[8] 83 Cong.Rec. 6879 (May 16, 1938).

[9] 83 Cong.Rec. 7104 (May 18, 1938).

[10] See footnote 11 post.

1963 Mr. Lindsay introduced H.R. 2522. It contained a proposed new subsection to section 1403 reading in part, as follows: "Any conveyance, lease, mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, or assignment ... thereof, ... which affects the title to, or any interest in, any aircraft, ... which is valid as against the parties thereto ... under the laws of that State, District of Columbia, territory, or possession of the United States in which such conveyance or other instrument is delivered, shall, upon the filing of such conveyance or other instrument for recordation ... be valid, in respect of the title or interest so transferred or created, as against all creditors, subsequent purchasers, encumbrancers, or other persons ..." (Emphasis added.) At a meeting of the Subcommittee on Transportation and Aeronautics of the Committee of Interstate and Foreign Commerce of the House of Representatives on June 18, 1963, Mr. Lindsay made it clear that the sole purpose of the bill was to provide a statutory choice of law with respect to the formal validity of instruments tendered for recording by the F.A.A. During the hearings several representatives expressed concern over the meaning of the emphasized language in the proposed new subsection which, it will be noted, bears striking similarities to the portion of section 1403(d) of 49 U.S.C.A. providing that a recorded instrument "shall from the time of its filing for recordation be valid as to all persons...

Several representatives posed various hypothetical questions to Mr. James D. Hill, Deputy General Counsel of the F.A.A. In the main, the subcommittee members were worried about the application of lien laws and statutes giving priority to subsequent creditors in states other than the state of the delivery of the instrument, provided such laws were otherwise applicable under appropriate choice of law rules. Mr. Hill most emphatically disspelled the notion that the proposed statute was intended to affect priorities enacted or recognized by applicable state laws. Indeed, in reply to several questions, Mr. Hill stated, in one form or another, that the recording provisions of the Federal Aviation Act did not affect state priorities. For example, when he was asked about state statutes which, in the case of automobiles, permit the attachment of a vehicle which causes damage, followed by satisfaction of any judgment out of the proceeds of a forced sale, thereby reducing the priorities of mortgage creditors, the following colloquy ensued: "Mr. Hill. I say again that the validity of the mortgage does not affect its priority .... If the airplane becomes involved in some State law which gives rights to subsequent people who are prior to the recorded mortgagee, that that would be so. Mr. Hemphill. You mean you say that would be so, that the state law would apply? Mr. Hill. Yes. Mr. Hemphill. And would determine the priority at the location of the accident or collision or whatever offense might take place? Mr. Hill

Yes...." (Hearing on Aircraft Titles before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, June 18, 1963, p. 27; see also Ibid., pp. 25-26, 28. Emphasis added.)

Another representative, Mr. Springer of Illinois, pointed to the fact that to him the emphasized language in the proposed statute clearly intended to set up a set of priorities based on the law of the state of delivery, which law he did not believe should be applicable. He requested Mr. Hill to "supply clarifying language." (Ibid., p. 25.)

Apparently H.R. 2522 died in committee. Later in 1963 Mr. Lindsay, however, introduced H.R. 8673, which became section 1406, quoted above. It will be noted that section 1406, as enacted, did not contain the language in the proposed subdivision to section 1403 which had been part of H.R. 2522 and which had worried the subcommittee.

There has been very little scholarly writing on the problem presented in the case at bar. The only two discussions we have found favor the correctness of the trial court's ruling. Professor Scott, in his article "Liens in Aircraft: Priorities" 25 Journal of Air Law and Commerce, 193, criticizes In re Veterans' Air Express Co., D.C., 76 F.Supp. 684, which held that a recorded mortgage of the United States Government was senior to a repair lien

which assertedly had priority under common law principles and local statutes. "While the court is undoubtedly correct that Congress may establish the priority of its liens with respect to liens asserted by private individuals under state statutes or by virtue of common law, one may seriously question whether it intended to do so in this instance. The purpose of the statute was reportedly to eliminate confusion engendered by a multitude of state recording systems by providing a single basis for constructive notice, [footnote omitted] not to establish the priority of a recorded security interest over all subsequent claims ...." (Ibid., p. 203).

The other academic authority which we find on the trial court's side, is Professor Gilmore. In the section on aircraft liens in his work "Security Interests in Personal Property," (1965) he writes: "Except for the engine and spare parts liens, §503 [49 U.S.C.A. §1403] is not in any sense a substantive statute. Therefore, it is believed, apart from these substantive provisions, the question of formal requisites, and the operation of the recording system, state law should apply to determine any question arising in connection with a security interest in aircraft. [Footnote omitted.] The argument for a federal law solution is even weaker here than under any of the other federal statutes we have so far discussed: §503 is much less comprehensive than the Ship Mortgage Act and there is not the same federal

source of power that could be alleged in favor of a federal solution in the fields of copyright, patent and admiralty law. The cases decided under §503 all seem to assume that the state law is generally applicable and that §503 is clearly an 'interstitial' statute, which goes as far as it goes but no further." (Ibid., p. 426.)[11]

As far as case law is concerned, it must at once be admitted that we have

[11]The first sentence of this quote indicates that section 1403 of 49 U.S.C.A. does contain certain substantive provisions. The reference is to section 1403 (a) (2) and (3) of 49 U.S.C.A. which permits the recording of certain interests in specific engines and further provides for the recording of a "basket lien" on engines, propellors, appliances and spare parts maintained by air carriers. The statute also establishes priority of recorded liens on specific engines over engines included in the "basket lien" to the extent that these provisions allow the recording of security interests not recordable under state laws or establish priorities not recognized by such laws, they do, indeed, effectively nullify otherwise applicable state laws. If the result we reach in this case appears inconsistent with International Atlas Services, Inc. v. Twentieth Century Aircraft Co., 251 Cal.App.2d 434, 59 Cal. Rptr. 495, the reason for the inconsistency may lie in the fact that the International Atlas case deals with conflicting claims to the ownership of engines.

found no decision from any court binding on us, which is squarely in point. An annotation in 22 American Law Reports, Third Series, "Construction And Effect Of 49 U.S. Code §1403, Governing Recordation Of Ownership, Conveyances; And Encumbrances On Aircraft" (22 A.L.R.3d 1270), indicates that decisional law in the various state and federal courts which have considered the impact of section 1403 on state laws, contains something for everybody. Thus defendants here find great comfort in the language of a Georgia Court of Appeals in Dawson v. General Discount Corporation, 82 Ga.App. 29, 60 S.E.2d 653. In that case a conditional seller who had recorded his interest with the F.A.A. was held to have a title superior to that of the innocent buyer from the seller's vendee. In the course of its opinion the court said that: "... constructive notice was given by the recording of the instrument with the Civil Aeronautics Authority under the provisions of Title 49 U.S.C.A., which provides that every conveyance so recorded shall be valid as to all persons. No further act was required of the plaintiff to protect his rights. The defendant, before purchasing, had the opportunity to ascertain the paramount outstanding title by checking the records of the Civil Aeronautics Authority. This being so, his title to the aircraft was inferior to that of the plaintiff, and a verdict for the plaintiff in the trover action was demanded." (60 S.E.2d at p. 658.)[12]

[12]The court talks of the provision in section 1403(d) of 49 U.S.C.A. that an

In spite of the broad language in Dawson, it is of little significance to our problem because it does not appear that, as here, applicable state law would have led to a different result.

On the other hand, there are three federal cases, at least one of which is quite indistinguishable from ours, which prefer the innocent purchaser in the ordinary course of business over the holder of a security interest who has recorded with the F.A.A. The oldest is Aircraft Investment Corp. v. Pezzani & Reid Equipment Co., D.C., 205 F. Supp. 80. There a retailer of airplanes had mortgaged a new plane to the plaintiff's assignor. The mortgage provided that the rights of the parties were to be governed by the law of Texas. It was duly filed for recordation with the F.A.A., but one day before such filing the defendant had purchased and taken delivery of the plane. A motion for summary judgment by plaintiff

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instrument recorded with the F.A.A. shall be "valid as to all persons without further or other recordation ..." as if the sentence ended at the word "persons," so that recordation establishes validity against all persons under all circumstances. The concluding phrase, "without further or other recordation." suggests a more modest intention: that recordation by the F.A.A. has the same effect as compliance with state recordation requirements otherwise applicable to a particular transaction.

was denied on the basis of defendant's affidavit that it had no notice of the plaintiff's mortgage until it was recorded. The case is obviously distinguishable because of the mortgagee's late recordation, but the following dictum is noteworthy: "Plaintiff suggests that Congress has preempted the entire field of conveyancing of interests in aircraft. This view is erroneous, notwithstanding In re Veterans' Air Express Company, 76 F.Supp. 684 (D.N. J. 1948), which contains dicta on which plaintiff relies. Congress has said only that until an instrument purporting to convey an interest in an aircraft is recorded, in accordance with the Act, it is void as to third parties without notice. Upon federal recordation, it is valid without further recording. In providing for the recordation of various instruments pertaining to transactions affecting title or interest in aircraft, Congress has not impaired the existence and effectiveness of state laws creating and defining such instruments. Excepting the recording section of the Federal Aviation Act, the validity of the chattel mortgage here in question must be measured by the appropriate state law. Thus, if the purported chattel mortgage is void as to defendant under the appropriate state law, federal recording will not save it. Even if defendant had notice of plaintiff's mortgage, it may still be able to show reliance on conduct by the plaintiff amounting to a waiver of the mortgage lien, as both Texas and Michigan recognize such waiver...." (205 F.Supp.

at p. 82. Emphasis added.)

Closer to the facts of our case is Texas National Bank of Houston v. Aufderheide, D.C., 235 F.Supp. 599. There the mortgagee bank did record its mortgage with the F.A.A. before a dealer sold the plane in question to a bona fide purchaser for value, in spite of a clause in the mortgage prohibiting the sale or removal of aircraft without the mortgagee's written consent. The mortgagee had known of and acquiesced in the dealer's practice of selling mortgaged planes in the ordinary course of business and settling with the mortgagee after the sale. The court held for the purchaser saying: "The right of Congress to legislate in the field of registration of aircraft and to provide for the recordation of liens upon or conveyances of such craft is not questioned; and the validity as to third persons of conveyances or instruments affecting the title to aircraft, and the relative rights of claimants to such aircraft, to the extent that such rights are dependent upon the fact or time of recordation of conveyances or other instruments, are matters which are governed by the federal statute rather than by local law. [Citations omitted.] It does not follow, however, that section 1403 has repealed or abolished the general rule of chattel mortgage law that when a mortgagee consents to the sale of a mortgaged chattel free of lien by the mortgagor, the purchaser takes free of the mortgage lien and his rights are superior to those of the

mortgagee. [Citations omitted.] And a provision in a chattel mortgage prohibiting a sale of the mortgaged chattel without the mortgagee's consent is waived if the mortgagee knowingly permits the violation of such provision. 15 Am.Jur.2d, p. 324." (235 F.Supp. at p. 603.)

Although section 9307 cuts a broader exception than the principle found dispositive in Aufderheide, no sound reason appears why federal law should nullify that code section if it does not nullify the doctrine relied on in Aufderheide. Indeed, the court in Aufderheide later states: "In this connection the Court calls attention to the fact that the view here taken is consistent with that expressed in Section 9-307 of the Uniform Commercial Code which provides that a buyer in the ordinary course of business, other than a person buying farm products from a farmer, takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence...." (235 F.Supp. at p. 604.)

Finally and, we believe, indistinguishable from the case at bar, there is the decision in Northern Illinois Corp. v. Bishop Distributing Co., D.C., 284 F.Supp. 121, decided just two weeks after the judgment in the case at bar was entered. There the plaintiff financed the purchase of a new aircraft by a retail dealer. Its security agreement with the dealer was duly filed and recorded with the F.A.A. Between the filing and the recording of the agreement the defendant purchased the aircraft

from the dealer in the ordinary course of business.[13] The court acknowledged that: "... federal law rather than state law governs the rights of claimants to aircraft to the extent that these rights are dependent upon the fact or time of recordation of conveyances...." (284 F.Supp. at p. 124.) Nevertheless, relying on section 9-307 of the Uniform Commercial Code in force in the relevant state jurisdictions, the Court held for the purchaser. In doing so it was much encouraged by a dictum in State Securities Co. v. Aviation Enterprises Inc., 10 Cir., 355 F.2d 255, 22 A.L.R.3d 1263. In that case the holder of a security interest in an airplane had not recorded and the court was, therefore, able to hold for the purchaser from a dealer without having to meet the problem which confronts us. Nevertheless, after quoting relevant portions of section 1403 of 49 U.S.C.A., the court said: "By providing a federal system for registration of conveyances and liens affecting the title to aircraft, Congress has preempted that field and state recording statutes are not applicable to such title instruments.

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[13]The fact that the purchase took place before the actual recording of the security interest by the F.A.A. is immaterial. Section 1403(d) of 49 U.S.C.A. states that an instrument is valid as to all persons without further or other recordation "from the time of its filing for recordation." (See Kerley Chemical Corp. v. Colboch, 145 Cal.App.2d 509, 302 P.2d 621.)

[Footnote omitted.] However, questions of the validity of such title documents, actual notice, good faith purchaser status, and the like, must be resolved under state law. [Footnote omitted.]." (355 F.2d at p. 229. Emphasis added.)

In its discussion the Northern Illinois court also disposes of the point that aircraft are not to be treated in the same way as other goods: "Plaintiff argues that because aircraft are much more costly than household goods or cars, a buyer of an aircraft should be required to conduct an aircraft title search. In this respect, plaintiff contends that all that would have been required of the defendants would have been for them to check with the Federal Aviation Agency in Oklahoma City, Oklahoma.

"We question whether the price of goods should determine the duties and obligations of the buying public. Plaintiff was aware that Mich-Air Mooney, Inc., purchased the aircraft in order to sell it." (284 F.Supp. at p. 125.)

[1] We think that Northern Illinois is correct and that there is nothing in section 1403 of 49 U.S.C.A. which intends to override a state law providing that a buyer in the ordinary course of business takes free of a security interest created by his seller. In so holding we do not

deny the power of Congress, under the Interstate Commerce clause, so to provide. We merely hold that it has not done so.[14]

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[14]Professor Gilmore puts the point as follows: "The several provisions summarized above obviously amount to a good deal more than a recording system (like the patent and copyright provisions) but are still a good deal less than a comprehensive coverage of security interests in aircraft; they are much less comprehensive than the Ship Mortgage Act, which goes into great detail on the formal requisites and priorities of ship mortgages and includes sections on foreclosure and on the status of mortgages on foreign flag ships. [Footnote omitted.] There is of course no plenary federal power over air transportation comparable to the patent and copyright powers or even to the extention of the 'judicial power of the United States' to admiralty and maritime cases. Here Congress acts under the interstate commerce and the bankruptcy powers--which have, however, become so extensive that there is not likely to be any constitutional challenge to anything Congress has done or may do in the future. A truly comprhensive security statute for aircraft--or indeed a statute covering security interests in transportation equipment of any kind, by air, rail, road and water--would undoubtedly be within the power of Congress to enact; there is, however, little likelihood that such a federal preemption of the field will take place in the near future.... [Footnote omitted.]" (Gilmore, op. cit. p. 423.)

It would indeed be anomalous if by saying nothing whatever about priorities, Congress had intended to wipe out all state laws which on considerations of equity and public policy have created exceptions to the "first in time, first in right" rule.

Defendants make much of plaintiff's familiarity with the recording provisions of the Federal Aviation Act and his knowledge of his ability to obtain a report on the state of the title of the aircraft by making a telephone call. If defendants' argument in that respect means that this particular buyer in the ordinary course of business is estopped to rely on section 9307, it may be pointed out that estoppel was never put in issue by the pleadings or the pre-trial order. Further, the argument assumes that the definition of "buyer in ordinary course of business" in section 1201 (9) contains an implied exception relating to buyers who are familiar with the provisions of section 9407(2), concerning the duties of a filing officer to furnish requested information on financing statements on file. Finally, there is nothing in the record before us which suggests that an inquiry with the F.A.A. would have revealed that the sale to plaintiff was "in violation of some term in the security agreement not waived by the words or conduct of the secured party." (U.C.C. Comment to §9-307.)[15]

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[15] The trial court adverted to the fact that even a "clean" report on a particular

The judgment must therefore be affirmed as far as the principal issue, the ownership of the aircraft, is concerned. No separate contention is made with respect to the modest award for loss of use. The court, however, also awarded plaintiff $1,000.00 in punitive damages, finding that the repossession of the plane without plaintiff's knowledge or consent and without investigation, but in full awareness that Dowell had paid Tanger $30,000.00, was oppressive.

[2] The right of a conditional seller to "proceed without judicial process if

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aircraft's title by the F.A.A. furnishes no assurance. "[T]here is no practical way for the customer to protect himself. In fact, in the absence of title insurance companies or escrow companies located exactly in Oklahoma City so that they will be able to provide simultaneous release and re-recordation of the new instruments, [even] the Bank of America would not be able to protect itself by merely calling Oklahoma City. It would find out that at the particular time of that call there is no lien. The lien could be filed 15 minutes later. They could take their lien and attempt to get it on record that same afternoon, and they would be helpless. So, there are very practical reasons, I think, for holding, first, that Congress had no intention to oust the state courts of all of their jurisdiction over those multiplicity of personal problems that go after recordation and that are not solved by recordation."

this can be done without breach of the peace" was established by statute. (Comm. Code., §9503.) The legal question involved was and is an extremely close one. Defendants acted on advice of counsel. Time was, presumably, thought to be of the essence, for airplanes are mobile and easily spirited away. Practical success of lawsuits for damages depends entirely on the plaintiff's ability to locate assets. Under the circumstances we cannot agree that defendants' conduct was oppressive within the meaning of section 3294 of the Civil Code.

The judgment is reversed as far as the imposition of $1,000.00 in punitive damages is concerned. In all other respects it is affirmed. Plaintiff is to recover his costs on appeal.

STEPHENS and AISO, JJ., concur.

IN THE
SUPREME COURT OF CALIFORNIA

IN BANK

L.A. 29751

DONALD A. DOWELL
Plaintiff & Respondent

v.

BEECH ACCEPTANCE CORPORATION INC., et al.,
Defendants & Appellants

November 16, 1970

MOSK, Justice.

We consider whether the system of recordation of title to aircraft under the Federal Aviation Act (49 U.S.C.A §1403) affects the priorities under state law between prior security holders and subsequent buyers in the ordinary course of business. Specifically, we must decide whether the holder of a prior, recorded security interest in a new airplane prevails over a subsequent buyer in the ordinary course of business who neither recorded his own title nor searched the Federal Aviation Agency (F.A.A.) records to discover the security holder's prior claim. We conclude that the federal statute requires judgment in favor of the holder of the prior recorded security

interest.

The facts are not in dispute: The airplane in question, a Beechcraft Bonanza aircraft, was sold by the manufacturer to Nevadair, one of its distributors. On October 26, 1965, Nevadair delivered the plane to Marion Tanger, a duly authorized Beechcraft dealer, pursuant to a conditional sales contract. The contract provided that Tanger was not to sell the plane without Nevadair's consent and that Nevadair retained a security interest in the plane to the extent of the unpaid balance of the purchase price. Nevadair assigned its security interest to defendant Beech Acceptance Corporation, a company in the business of aircraft financing. On October 27, 1965, Beech filed the conditional sales contract and the assignment with the Federal Aviation Agency, pursuant to 49 United States Code Annotated section 1403, and the instruments were recorded as of November 4, 1965.

In July of 1966, plaintiff purchased the plane from Tanger for $30,000, the sum being paid in full. He made no inquiry as to the state of the title ostensibly because the plane was new and Tanger was an authorized dealer. However, plaintiff was not inexperienced in the field of aviation. He was a member of the Aircraft Owners and Pilots Association, was familiar with F.A.A. rules and was aware that he could have checked the title with the F.A.A. for a $3.50 fee. Apparently Tanger promised plaintiff that he would file plaintiff's bill of sale with the F.A.A.

Aircraft Registry but failed to do so. At the time of the sale to plaintiff, Tanger owed Beech $21,366.03 plus interest, but not until September 22, 1966, did he confess to Beech that he had sold the plane. The following day, Beech, Nevadair, and Larson (Nevadair's parent corporation), on the advice of counsel, removed the plane from plaintiff's possession without his knowledge and consent.

Plaintiff thereupon brought this action to establish his title to the plane and to recover compensatory and punitive damages against defendants. Through a claim and delivery proceeding at the outset of his action, plaintiff recovered possession of the airplane on October 22, 1966, pending trial. After trial, the court awarded the plane to plaintiff along with $175 compensatory damages, representing the value of the use of the plane between September 23 and October 22, 1966. Plaintiff was also awarded $1,000 punitive damages, on the theory that defendants' seizing possession of the airplane without plaintiff's consent on September 23 constituted oppressive conduct.

Section 503 of the 1958 Federal Aviation Act, 49 United State Code Annotated section 1403, provides in relevant part: "(a) The Administrator shall establish and maintain a system for the recording of each and all of the following: (1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States; (2)

Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any specifically identified aircraft engine...or any specifically identified aircraft propeller...and also any assignment or amendment thereof or supplement thereto... (b) The Administrator shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge, or satisfaction relating to any conveyance or other instrument recorded under said system. (c) No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, aircraft engine or engines, [or] propellers...against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator...(d) Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation, ...(f) The Administrator shall keep a record of the time and date of the filing of conveyances and other instruments with him and of the time and date of recordation thereof. He shall record conveyances and other

instruments filed with him in the order of their reception, in files to be kept for that purpose, and indexed according to.... the identifying description of the aircraft, aircraft engine, or propeller...and....the names of the parties to the conveyance or other instrument."

Section 506 of the Act, 49 United States Code Annotated section 1406, was added in 1964 and provides: "The validity of any instrument, the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State...in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument."

Our task is to determine whether the foregoing federal system of recording interests in aircraft affects priorities recognized by applicable state law. The issue is squarely before us because, absent the federal recording system and its possible impact on state law, there can be no doubt that Tanger had the power to defeat Beech's security interest by a sale to a buyer in the ordinary course of business and that plaintiff was such a buyer. Section 9307 of the California Commericial Code provides that, "A buyer in ordinary course of business (subdivision (9) of Section 1201) [1]... takes free of a security

[1]Section 1201, subdivision (9), defines a "buyer in ordinary course of business" as "a person who in good faith and without knowledge that the sale to him is in

interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." Hence, under California law, plaintiff would prevail over defendant Beech Acceptance Corporation regardless of whether defendant recorded its security interest and even if plaintiff knew of the existence of the security interest, so long as he was not aware of any terms of the security agreement that were violated by the sale to him. (See Uniform Commercial Code Comment 2, Com. Code, §9307.)

Although this matter is of first impression in our court, we are cognizant of the helpful authority in the Courts of Appeal on the question of the relationship between the federal recording system and state priorities. In Pope v. National Aero Finance Co. (1965) 236 Cal.App.2d 722, 46 Cal. Rptr.233 (hearing denied), Justice Sullivan considered the assertion of plaintiffs that they held an interest in an aircraft superior to that of the prior recorded security interest of a mortgagee. Although there was doubt as to whether plaintiffs had any interest in the plane, the Court of Appeal assumed arguendo that they had acquired ownership. Plaintiffs had obtained their interest subsequent to the defendant-mortgagee's acquisition of its security interest, but two

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violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind...."

days before the latter's interest was recorded. Said the court, "The federal statute requiring recordation and providing for the effect to be given to instruments not recorded pursuant thereto, preempts any state laws which might otherwise apply.... Even if, as we here assume for the sake of argument, plaintiffs actually acquired some interest in the [aircraft] by virtue of their agreements, we are of the opinion that under the abovementioned federal statute and the... cases interpreting it, it was incumbent upon them to record the documents under which they claimed ownership and having failed to do so at any time are not entitled to priority over NAFCO, the chattel mortgagee who in addition to acquiring its interest under a prior chattel mortgage filed the same for record in good faith and without any notice of plaintiffs' claims.... [I]t would be violative of the purpose of the federal act to permit plaintiffs, who did nothing to comply with its registration and recordation provisions, to prevail over NAFCO which lent money on the strength of the record title in [the seller mortgagor] and recorded its mortgage with the federal agency." (Fn. omitted.) (Pope v. National Aero Finance Co. (1965) supra, 236 Cal.App2d 722, 733, 734-735, 46 Cal. Rptr. 233,240-241.)

Although the facts are distinguishable from those in the case at bar, the reasoning of the Pope court has clear application here. In deciding the priorities between a

mortgagee with a recorded interest and a subsequent purchaser who acquired his interest before the mortgagee's interest was recorded but who failed to record his own interest, the court looked to the federal law and determined that the policy underlying the recordation system precluded judgment for plaintiffs who had failed to comply with the recordation provisions. In the instant action it was conceded that defendant Beech's interest was recorded months before plaintiff's purchase, and plaintiff was aware he could have checked title with the F.A.A. by telephone for a mere $3.50. As in Pope, defendant-mortgagee did all it could to protect its security interest by giving notice in the form of recordation to potential third-party purchasers. We would undermine any federal policy requiring recordation to protect previously acquired aircraft titles if we held that state law governed the rights of the parties irrespective of recordation.

Further persuasive precedent is provided by International Atlas Services, Inc. v. Twentieth Century Aircraft Co. (1967) 251 Cal.App.2d. 434, 59 Cal.Rptr. 495 (hearing denied). In that case defendant sold an airplane to a retailer pursuant to a conditional sales contract by which defendant retained a security interest in the plane. The security interest was recorded with the F.A.A. Subsequently, the retailer hired plaintiff Atlas to repair the engines of the plane and become indebted to plaintiff for the repairs. The retailer eventually

defaulted on all of his obligations, and defendant repossessed the airplane. Atlas claimed ownership of the engines by virtue of its mechanic's lien.

At the outset, the Court of Appeal reviewed the California law on priorities in both the Civil Code and the new Commercial Code and concluded "that under California law Atlas at a minimum should recover the value of its engines and at a maximum should recover the engines themselves. Nevertheless, we have concluded that California law does not apply to this case, that the controversy is governed by the laws of the United States, and that under federal law Twentieth Century must prevail. As we see it, general California law on the subject of title and liens to personal property in relation to component parts has been superseded by specific federal law with respect to aircraft." (Id. at p. 438, 59 Cal.Rptr. at p. 497).

After quoting from the relevant subsections of section 1403, the Court of Appeal continued: "To bring order into the field of aircraft ownership and finance, the federal government in a manner within its sphere set up a comprehensive scheme of centralized recordation, which, if properly used, provides adequate protection for all substantial property interests in large aircraft,...A conveyance, lease, or security instrument recorded under section 1403(a) is fully valid against all persons from the time of its filing without further or other recordation.

Under section 1403(c) a conveyance or instrument which could have been recorded but was not, is, until so recorded, invalid against a person without actual notice of the conveyance or instrument....

"Here we have a complete and comprehensive system of recordation which necessarily supersedes inconsistent state law. Constitutionally, the federal goverment may be said to have fully occupied the field of interests in aircraft and of rights derived from recordation, and to have established paramount law in this area. Atlas could have fully protected its rights in these engines and preserved a good title throughtout the world by...recording its interest in specifically numbered aircraft engines with the Federal Aviation Agency." (Id. at p.440, 59 Cal. Rptr. at p. 498.)

Despite the factual distinctions between Atlas and the case at bar, the above-quoted passages would seeem to be a compelling rationale for the proposition that the federal system of recordation affects the priorities under state law between prior security holders and subsequent lienholders and purchasers. As construed by the Court of Appeal, section 1403 provides a comprehensive system of recordation the purpose of which is to bring order to the field of aircraft titles and to protect the holders of substantial property interests in aircraft. Neither of those purposes is served if we apply state law in a manner virtually ignoring the existence of the federal system. If prior recorded interests are not protected against subsequent buyers who fail to search

title, the federal policy in favor of the recordation of aircraft titles will be frustrated and subsequent purchasers in California will cavalierly decline to investigate title so as to avoid "actual notice" under Commercial Code section 9307.

The California Courts of Appeal have not been alone in suggesting that prior recorded security interests under Federal law should take precedence over subsequent purchasers. Although decisions in other jurisdictions have varied widely (see generally Annot. (1968) 22 A.L.R.3d 1270), most courts have taken a view consistent with that espoused in Pope and Atlas. The case of In re Veterans' Air Express Co. (D.N.J.1948) 76 F. Supp. 684, contains some particularly appropriate language: "It is clear that the Congress has prescribed the only way in which aircraft may be transferred and in which liens upon aircraft may be duly recorded. In this manner, all persons dealing with aircraft are upon full legal notice concerning possible liens and are charged with the duty of inquiry at the central recording office of the Civil Aeronautics Administration [predecessor to the Federal Aviation Agency] with respect to any aircraft in which they might be concerned." (Id. at p. 688.) (Emphasis added).

In Dawson v. General Discount Corporation (1950) 82 Ga.App. 29, 60 S.E.2d 653, a Georgia appellate court considered facts almost identical to those before us. There,

the plaintiff-mortgagee, who had acquired and recorded his security interest while the subject aircraft was in the possession of the conditional buyer, brought suit for possession of the plane against a subsequent purchaser who had failed to search title before his purchase. In affirming a judgment for the plaintiff-mortgagee, the court concluded: "[C]onstructive notice was given by the recording of the instrument with the Civil Aeronautics Authority under the provisions of Title 49, U.S.C.A., which provides that every conveyance so recorded shall be valid as to all persons. No further act was required of the plaintiff to protect his rights. The defendant, before purchasing, had the opportunity to ascertain the paramount outstanding title by checking the records of the Civil Aeronautics Authority." (Id. at p. 658)

Other cases adopting a view as to priorities based upon the federal recordation provisions include Marsden v. Southern Flight Service, Inc. (M.D.N.C.1964) 227 F.Supp.411, 415,418-419; United States v. United Aircraft Corporation (D.Conn.1948) 80 F.Supp.52; Smith v. Eastern Airmotive Corp. (1968) 99 N.J.Super. 340, 240 A.2d 17; Crescent City Aviation, Inc. v. Beverly Bank (1966), 139 Ind.App. 669, 219 N.E.2d 446; Continental Radio Co. v. Continental Bank & Trust Co. (1963), Tex.Civ.App., 369 S.W.2d 359, 362; and James Talcott, Inc. v. Bank of Miami Beach (Fla.App.1962) 143 So.2d 657,659.

In deciding that defendant's prior recorded security interest must prevail over

a buyer in the ordinary course of business in order to further the policies expressed in section 503 of the Federal Aviation Act, we do not overlook those few cases reaching a contrary conclusion. Rather we do not find them persuasive and simply decline to follow them. In Northern Illinois Corp. v. Bishop Distributing Co. (W.D.Mich.1968) 284 F.Supp. 121 and Texas National Bank of Houston v. Aufderheide (E.D.Ark.1964) 235 F. Supp. 599, the courts looked to state law and held that a buyer in the ordinary course of business should prevail over a prior mortgagee with a recorded security interest. Both courts concluded that state law governed priorities to aircraft and that persons buying new aircraft from authorized dealers without actual notice of prior claims (buyers in ordinary course of business) should not have to search title to protect their claims. While the view espoused in those cases has some appeal from a policy perspective, it ignores the impact of the overriding federal policy in section 1403. The federal policy to foster recordation and to protect recorded interests is eviscerated by a rule which relies on state laws to protect the buyer in the ordinary course of business even though he fails to undertake a simple title search which would have readily revealed all encumbrances.

For the foregoing reasons, we conclude that the judgment granting possession of the disputed airplane to plaintiff must be reversed. Because we have decided that the mortgagee holds a superior right to the air-

craft, to the extent of his investment in it, the award of compensatory damages to plaintiff for his loss of use of the plane must be reversed; and it also follows that the award of punitive damages may not be sustained.

The judgment is reversed and remanded to the trial court with directions to amend its findings of fact and conclusions of law in accord with the views expressed herein and to enter judgment for Beech establishing the priority of Beech's security interest in the airplane.

WRIGHT, C. J., and McCOMB, PETERS, TOBRINGER, BURKE, and SULLIVAN, JJ., concur.

Order Due
January 15, 1971

ORDER DENYING REHEARING

L.A. No. 29751

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

Filed January 14, 1971

DOWELL

v.

BEECH ACCEPTANCE CORPORATION, INC., ET AL.

Respondent's petition for rehearing DENIED.

/S/ Wright
Chief Justice

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In the Supreme Court of the United States

OCTOBER TERM 1970

70-116

DONALD A. DOWELL,
Petitioner

v.

BEECH ACCEPTANCE CORPORATION, INC.,
NEVADAIR COMPANY,
NORMAN LARSON COMPANY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

NO. _____

DONALD A. DOWELL,
Petitioner

v.

BEECH ACCEPTANCE CORPORATION, INC.,
NEVADAIR COMPANY,
NORMAN LARSON COMPANY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The petitioner, Donald A. Dowell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California rendered in this proceeding on November 16, 1970.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California, reported at 3 Cal.3rd

544, appears at page 57 of the Appendix hereto. The opinion of the Second Appellate Division of the Court of Appeal of the State of California is reported at 84 Cal.Rptr. 654 and appears at page 29 of the Appendix. The opinion of the trial judge is unreported and appears at page 8 of the Appendix.

JURISDICTION

This judgment of the Supreme Court of the State of California was entered on November 16, 1970. A timely petition for rehearing was denied on January 14, 1971, and this petition for certiorari was filed within 90 days of that date. The order denying rehearing appears at page 71 of the Appendix. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

QUESTION PRESENTED

Whether the system of recordation of title to aircraft under §503 of the Federal Aviation Act of 1958, 49 U.S.C. §1403, affects priorities under state law between a prior security holder and a subsequent buyer in the ordinary course of business.

STATUTORY PROVISIONS INVOLVED

Section 101(17) of the Federal Aviation Act of 1958, 49 U.S. C. §1301 (17), set out in the Appendix at page 1.

Section 503 of the Federal Av tion Act of 1958, 49 U.S.C. §1403, set out in the Appendix at page 1.

California Commercial Code, §2403, West's Ann. Cal. Comm. Code, (West 1964) at Volume 23A, page 382, set out in the Appendix at page 6.

California Commercial Code, §9307, West's Ann. Cal. Comm. Code, (West 1964) at Volume 23C, page 501, set out in the Appendix at page 7.

California Commercial Code, §1201 (9), West's Ann. Cal. Comm. Code, (West 1964) at Volume 23A, page 48, set out in the Appendix at page 7.

STATEMENT OF THE CASE

The question decided by the Supreme Court of the State of California and which is presented in this petition is a federal question of substance not heretofore determined by this Court. The essential facts giving rise to the question are not in dispute.

Petitioner purchased a new Beechcraft Bonanza aircraft from a duly authorized Beechcraft dealer for a cash consideration of $30,000.00. Approximately two months later, respondent Beech Acceptance Corporation, Inc. (Beech) seized possession of the aircraft from petitioner, without petitioner's knowledge or consent.

Respondent Beech claims legal authority for the seizure under the following circumstances. The aircraft was manufactured by Beech Aircraft Corporation and sold by the manufacturer to respondent Nevadair Company (Nevadair), one of its distributors. Thereafter the aircraft was sold and delivered to Marion Tanger (Tanger), a duly authorized Beechcraft dealer, pursuant to a conditional sales contract. The contract provided that Tanger was not to sell the aircraft without respondent Nevadair's consent and that respondent Nevadair retained a security interest in the aircraft to the extent of the unpaid balance of the purchase price. Respondent Nevadair assigned its security interest to respondent Beech, and respondent Beech filed the conditional sales contract and the assignment with the Federal Aviation Administration pursuant to 49 U.S.C. §1403.

Petitioner purchased the aircraft from Tanger without inquiring as to the state of its title, though he knew of the federal recording system and had previously utilized title-search services before buying another aircraft from a private owner. His stated reason for failing to inquire about the state of title was:

> I didn't think it was necessary to pry into it because it was a brand new aircraft and it had ferry time only, and I was buying a new aircraft and he [Tanger] was an authorized representative of the Beech

> Corporation, so I thought it was like I was buying it from Beech directly.... If I bought it from an individual, which I did my first plane, I did check from Oklahoma [Federal Aviation Administration Aircraft Registry] to see if there was any encumbrance against it but I didn't think it was necessary in this case.... In my lifetime I have purchased 25 cars from General Motors, from authorized franchised dealers, and never questioned their ability to, or legal right to sell me that automobile or worry about General Motors coming and stealing it out of my garage.

Tanger defaulted on the conditional sales contract, and respondent Beech, with the aid of others, seized possession of the aircraft through self help, without petitioner's knowledge or consent.

Thereupon petitioner brought suit in the Superior Court of the State of California for the County of Los Angeles, to establish his title to the aircraft and to recover compenstory and punitive damages against respondents. After trial, the court awarded the aircraft to petitioner along with $175.00 compensatory damages for loss of use and $1,000.00 punitive damages due to respondents' oppressive conduct in seizing possession of the airplane without petitioner's consent. In

reaching this result, the trial court held in effect that the federal government has not occupied the entire field of aircraft title law but merely the recording aspect, and that with respect to priorities between a bona fide purchaser from a merchant in the ordinary course of business and the holder of a prior federally recorded security interest, state law must control. Under California law, the purchaser in the ordinary course of business takes free and clear of the security interest created by his seller. To put the holding in terms of the question presented, the trial court held that the system of recordation of title to aircraft under 49 U.S.C. §1403 does not affect priorities under state law between a prior security holder and a subsequent buyer in the ordinary course of business.

Upon appeal to the Second Appellate District of the California Court of Appeal, the judgment was affirmed except as to the award of punitive damages. The Court of Appeal held that,

> there is nothing in Section 1403 of 49 U.S.C.A. which intends to override a state law providing that a buyer in the ordinary course of business takes free of a security interest created by his seller.

Upon appeal to the Supreme Court of California, the judgment granting possession

of the aircraft and awarding damages to petitioner was reversed. The case was remanded to the trial court to enter judgment for Beech establishing the priority of Beech's security interest in the aircraft. The Supreme Court of California held that the system of recordation of title to aircraft under 49 U.S.C. §1403 does affect priorities established by state law, and that that provision requires that the holder of a prior recorded security interest in a new aircraft must prevail over a subsequent buyer in the ordinary course of business.

ARGUMENT

It is respectfully submitted that certiorari should be granted in this case because the question presented is a federal question of substance not heretofore determined by this Court. The resolution of this question by the California Supreme Court in this case is in conflict with decisions of several United States District Courts which have been called upon to decide the question.

The question is a substantial one because the fact situation presented in this case is typical of aircraft marketing transactions taking place on a daily basis throughout this country.[1] The retail

[1]While there are no statistics informing of the number of aircraft sales which have been made through retail dealers in aircraft, the statistics which are

aircraft dealer finances the acquisition of his inventory by a loan or loans from a bank or other financial institution which is given a security interest in the aircraft in inventory--so called "floor plan" financing. The question is whether a purchaser of an aircraft from the aircraft dealer takes title free of the security interest created by the dealer if the lending institution has filed its security interest for recordation with the Administrator of the Federal Aviation Administration pursuant to 49 U.S.C. §1403.

As the California Supreme Court concedes, "absent the federal recording system and its possible impact on state law, there can be no doubt that [the aircraft dealer] had the power to defeat [the financial institution's] security interest by a sale to a buyer in the ordinary course of business," citing Section 9307 of the California Commercial Code. This section has been adopted in substance in each of

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available are helpful in estimating the scope of the problem. According to the Aircraft Owners and Pilots Association, the major general aviation manufacturers produced 12,581 new aircraft in 1969 with an estimated retail value of 632.2 million dollars, and in 1970 produced 7,420 new aircraft with an estimated retail value of 396.2 million dollars. As of January 1, 1971 there were 137,424 active general aviation aircraft of United States registry. The AOPA PILOT, February 1971, p. 42.

the States of the Union[2] (except Louisiana but including the District of Columbia and the Virgin Islands), and provides, in pertinent part, that, "A buyer in ordinary course of business (subdivision (9) of Section 1201) ... takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." Section 1201, subdivision (9), defines a "buyer in ordinary course of business" as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind...." Also Section 2403 reads in relevant part: " (1) A purchaser of goods acquires all title which his transferor had or had power to transfer....(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."

However, the California Supreme Court went on to hold that the buyer must take subject to the security interest because of the application of 49 U.S.C. §1403. This section establishes a federal recording system for the recording of "any

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[2]See generally, Anderson's Uniform Commercial Code, Code Localizer (1968, Supp. 1971).

conveyance which affects the title to, or any interest in, any civil aircraft of the United States," and provides that "each conveyance or other instrument recorded by means of or under the system ... shall from the time of its filing for recordation be valid as to all persons without further or other recordation." The California Supreme Court decided that the prior recorded security interest must prevail over a buyer in the ordinary course of business in order to further the policies expressed in this section.

This decision, and the authorities upon which it relies,[3] are in conflict with

[3]The California Supreme Court relies principally on In re Veterans' Air Express Co., 76 F.Supp. 684 (D.N.J. 1948); Dawson v. General Discount Corporation, 82 Ga.App. 29, 60 S.E.2d 653 (1950); Pope v. National Aero Finance Co., 236 Cal.App.2d 722, 46 Cal.Rptr. 233 (1965); and International Atlas Service, Inc., v. Twentieth Century Aircraft Co., 251 Cal. App.2d 434, 59 Cal.Rptr. 495 (1967) (cert. denied, 389 U.S. 1038), thus focusing on the conflict in the decisions. It also cites as "other cases adopting a view as to priorities based upon the federal recordation provisions": Marsden v. Southern Flight Service, Inc., 227 F.Supp. 411, (M.D.N.C. 1964); United States v. United Aircraft Corporation, 80 F.Supp. 52, (D. Conn. 1948); Smith v. Eastern Airmotive Corp., 99 N.J.Super. 340, 240 A.2d 17,

the decisions of the United States District Courts in Aircraft Investment Corp. v. Pezzani & Reid Equip. Co., 205 F.Supp. 80 (E.D.Mich. 1962); Texas National Bank of Houston v. Aufderheide, 235 F.Supp. 599 (E.D.Ark. 1965); and Northern Illinois Corp. v. Bishop Distributing Co., 284 F. Supp. 121 (W.D.Mich. 1968).

In Aircraft Investment Corp. v. Pezzani & Reid Equip. Co., supra, decided by the Eastern District of Michigan, the defendant ordered a new aircraft from an aircraft retailer. The aircraft retailer "floor plan" financed the new plane, giving a mortgage to the plaintiff lender. It was duly filed for recordation with the Federal Aviation Agency (predecessor to the present Federal Aviation Administration) one day after the defendant completed the purchase and took delivery of the plane. The retailer defaulted on the mortgage and became bankrupt. Plaintiff mortgagee sued defendant purchaser for recovery of the aircraft or the amount owed. A motion for summary judgment by plaintiff was denied on the basis of defendant's affidavit that it

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(1968); rev'd., 108 N.J.Super. 368, 261 A.2d 399 (App.Div. 1970); Crescent City Aviation, Inc. v. Beverly Bank, 139 Ind. App. 669, 219 N.E.2d 446 (1966); Continental Radio Co. v. Continental Bank & Trust Co., 369 S.W.2d 359, (Tex.Civ.App. 1963); and James Talcott, Inc. v. Bank of Miami Beach, 143 So.2d 657, (Fla. App. 1962).

had no notice of the plaintiff's mortgage until it was recorded. The case is distinguishable because of the mortgagee's late filing, but the following dictum is noteworthy:

> Plaintiff suggests that Congress has pre-empted the entire field of conveyancing of interests in aircraft. This view is erroneous, notwithstanding In re Veterans' Air Express Company, 76 F.Supp. 684 (D.N.J. 1948), which contains dicta on which plaintiff relies. Congress has said only that until an instrument purporting to convey an interest in an aircraft is recorded, in accordance with the Act, it is void as to third parties without notice. Upon federal recordation, it is valid without further recording. In providing for the recordation of various instruments pertaining to transactions affecting title or interest in aircraft, Congress has not impaired the existence and effectiveness of state laws creating and defining such instruments. Excepting the recording section of the Federal Aviation Aviation Act, the validity of the chattel mortgage here in question must be measured by the appropriate state law.

Thus, if the purported chattel

> mortgage is void as to defendant under the appropriate state law, federal recording will not save it. Even if defendant had notice of plaintiff's mortgage, it may still be able to show reliance on conduct by the plaintiff amounting to a waiver of the mortgage lien, as both Texas and Michigan recognize such "waiver." (205 F.Supp. at 82).

Texas National Bank of Houston v. Aufderheide, supra, decided by the Eastern District of Arkansas, presents a fact pattern substantially similar to the case at bar. The mortgagee of a retail aircraft dealer recorded its "floor plan" mortgage with the Federal Aviation Agency before the dealer sold the plane to a bona fide purchaser for value. The purchaser did not search the records of the Federal Aviation Agency, nor did he have actual knowledge or notice of the mortage lien prior to the purchase. The dealer defaulted and the mortgagee sued the purchaser claiming that since its mortgage was duly recorded prior to the purchase, the mortgage lien is valid and superior to the interest of of the purchaser by virtue of 49 U.S.C. §1403. The mortgagee had known of and acquiesced in the dealer's practice of selling mortgaged planes in the ordinary course of business and settling with the mortgagee after the sale. The court held for the purchaser saying:

> The right of Congress to legislate in the field of registration of aircraft and to provide for the recordation of liens upon or conveyances of such craft is not questioned; and the validity as to third persons of conveyances or instruments affecting the title to aircraft, and the relative rights of claimants to such aircraft to the extent that such rights are dependent upon the fact or time of recordation of conveyances or other instruments, are matters which are governed by the federal statute rather than by local law. (Citations omitted.)
>
> It does not follow, however, that section 1403 has repealed or abolished the general rule of chattel mortgage law that when a mortgagee consents to the sale of a mortgaged chattel free of lien by the mortgagor, the purchaser takes free of the mortgage lien and his rights are superior to those of the mortgagee. (Citations omitted.) And a provision in a chattel mortgage prohibiting a sale of the mortgaged chattel without the mortgagee's consent is waived if the mortgagee knowingly permits the violation of such provision. (236 F.Supp. at 603).

The decision in Northern Illinois Corp. v. Bishop Distributing Co., supra, decided

by the Western District of Michigan, is precisely in point to the case at bar. There the plaintiff financed the purchase into inventory of a new aircraft by a retail dealer. Its security agreement with the dealer was duly filed and recorded with the Federal Aviation Agency. The defendant then purchased the aircraft from the dealer in the ordinary course of business. Not long afterward the dealer went bankrupt and the plaintiff sued for a declaration of its rights to the aircraft. The court acknowledged that:

> ... federal law rather than state law governs the rights of claimants to aircraft to the extent that these rights are dependent upon the fact or time of recordation of conveyances. (284 F.Supp. at 124).

Nevertheless, relying on section 9-307 of the Uniform Commercial Code in force in the relevant state jurisdictions, the court held for the purchaser as a buyer in the ordinary course of business. In so doing the District Court was much encouraged by dictum in State Securities Co. v. Aviation Enterprises, Inc., 355 F.2d 225 (10th Cir. 1966). In that case the holder of a security interest in an airplane had not recorded his interest, and the court was, therefore, able to hold for the purchaser from a dealer without having to meet the problem which confronts us. Nevertheless, after quoting relevant portions of 49 U.S. C. §1403, the court said:

> By providing a federal system for registration of conveyances and liens affecting the title to aircraft, Congress has preempted that field and state recording statutes are not applicable to such title instruments. (Footnote omitted.) However, questions of the validity of such title documents, actual notice, good faith purchaser status, and the like, must be resolved under state law. (Footnote omitted). (355 F.2d at 229).

Similar questions of importance involving interpretation of 49 U.S.C. §1403 have provoked the same conflict of interpretation. These questions also involve state laws assigning priorities between interests in aircraft on some basis other than the fact or time of recording. For example, some cases have held that state law giving priority to a repairman's lien over a prior recorded security interest is displaced by the federal recording provisions. In re Veterans' Air Express Co., 76 F.Supp. 684 (D.N.J. 1948); Crescent City Aviation, Inc. v. Beverly Bank, 139 Ind.App. 669, 219 N.E.2d 446 (Ind. App.Ct. 1966); Continental Radio Co. v. Continental Bank & Trust Co., 369 S.W.2d 359 (Tex.Civ. App. 1963); Smith v. Eastern Airmotive Corp., 99 N.J.Super. 340, 240 A.2d 17 (1968). A recent case has criticized this line of cases. In Southern Jersey Airways v. National Bank of Secaucus, 108 N.J.Super. 369,

261 A.2d 399 (App.Div. 1970), the court overruled Smith v. Eastern Airmotive, supra, and held that federal recording of defendant's lien did not accord it priority over a subsequent mechanics lien, and that relative priorities of the parties must be determined in accordance with state law.

The two leading scholarly works on the subject of aircraft lien priorities agree that Congress did not intend the federal recordation system to displace lien priorities established by state law. Scott notes in Liens in Aircraft: Priorities, 25 J. Air Law & Comm. 193, 203 (1958) that "recordation itself merely validates; it does not grant priority." Professor Gilmore's authoritative text says that "state law should apply to determine any questions arising in connection with a security interest in aircraft. The argument for a federal law solution is even weaker here than under any of the other federal statutes we have so far discussed.... [49 U.S.C. §1403] is clearly an 'interstitial' statute, which goes as far as it goes but no further." 1 Gilmore, Security Interests in Personal Property, §13.5, at 426-27.

It is submitted that the California Supreme Court erred in holding that the federal system of aircraft title recordation does affect state law priorities. This Court's attention is invited to the decision of the California Court of Appeal in this case (set out in the Appendix at page 57) in which Presiding Judge Kaus,

after a thorough and scholarly analysis of the legislative history, the scholarly writings, and the case law in point, concludes that "there is nothing in section 1403 of 49 U.S.C.A. which intends to override a state law providing that a buyer in the ordinary course of business takes free of a security interest created by his seller."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of California.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1970
No. 1560

DONALD A. DOWELL,

Petitioner,

vs.

BEECH ACCEPTANCE CORPORATION, INC., NEVADAIR COMPANY, NORMAN LARSON COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinions Below.

The opinion of the California Supreme Court (Petition, App. p. 57) is reported at 3 Cal. 2d 544. The opinion of the Second Appellate Division of the California Court of Appeal (Petition, App. p. 29) is reported at 84 Cal. Rptr. 654.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Whether the system of recordation of title to aircraft under the Federal Aviation Act (49 USCA

§1403) affects the priorities under state law between the holder of a prior recorded security interest in an airplane and a subsequent buyer who failed to record his own title and knowingly and willfully failed to search the Federal Aviation Agency (F.A.A.) records to discover the security holder's prior claim.

Statutes Involved.

The pertinent provisions of the Federal Aviation Act of 1958 and the California Commercial Code are set forth in Petitioner's Appendix to Petition.

Statement of the Case.

There is no dispute over the facts giving rise to the question presented.

A Beechcraft Bonanza aircraft, N-2041W, manufactured by Beech Aircraft Corporation, not a party to this action, was sold by that manufacturer to respondent Nevadair Company, one of its distributors. On October 26, 1965, Nevadair made a conditional sale of the plane to one Tanger, a duly authorized Beechcraft dealer. Under the terms of the written conditional sales contract Tanger was not permitted to sell the plane without Nevadair's consent. On the same day, Nevadair assigned all of its right, title and interest in the Conditional Sales Contract to respondent Beech Acceptance Corporation, Inc. (hereinafter "assignee") and Tanger was notified thereof.

On October 27, 1965, Assignee filed the contract and the assignment thereof with the Federal Aviation Agency (49 U.S.C. §1403), and the instruments were thereafter recorded on November 4, 1965.

Between July 15 and 18, 1966, petitioner negotiated with Tanger for the purchase of the plane.

Petitioner, an experienced pilot with several thousand hours of flying time, had an instrument rating and was licensed to fly gliders, helicopters, single engine, multi-engine and commercial aircraft. He had worked for Douglas Aircraft where he was employed as a flight engineer and co-pilot. He was also a "Bird Dog", or one who in aircraft jargon or lingo attempts to sell aircraft belonging to others for a fee or commission. As such, petitioner had placed ads for the purchase or sale of aircraft in the Los Angeles Times for a period of years prior to 1966. Prior to purchasing the aircraft involved herein, petitioner obtained a vendor's exemption certificate or a sales tax permit as he had decided to get involved in buying and selling aircraft.

During the year 1963, petitioner purchased a K Bonanza aircraft from a private individual, the title to which he checked with the FAA. At that date, as well as at all times involved herein, petitioner was a member of the Aircraft Owners & Pilots Association (hereinafter "AOPA"). One of the services performed by AOPA for its members is to check the status of the title of aircraft with the FAA and to report thereon. For just Three Dollars and fifty cents ($3.50), a member can telephone the AOPA facility in Oklahoma City and obtain an aircraft title report. This service apparently is quite expeditious for while petitioner was on the witness stand and unable to recall the specifics as to a particular aircraft, he testified: "We can find out real quick if you want to call Oklahoma".

At no time did Tanger advise petitioner of Assignee's interest. At no time did petitioner ask Tanger

any questions as to whether there were any liens or encumbrances on the aircraft.

When asked by his counsel as to why he did not question Tanger as to title, petitioner testified that the believed Beech Corporation would back Tanger up if Tanger didn't make good. It apparently had occurred to petitioner, therefore, that Tanger might not have good title to the aircraft, but this did not concern him enough to make a title search in the expectation that Beech would back Tanger. Petitioner obviously was referring to Beech Aircraft Corporation, not a party to this action, rather than assignee, since assignee was as unknown to petitioner as petitioner was to assignee.

At no time before purchasing the plane did petitioner make inquiry with the FAA which he knew he could have done expeditiously for $3.50.

Petitioner purchased the plane on July 18 and took delivery on July 19, 1966. Following the purported sale, Tanger continued to make monthly payments due under the conditional sales contract to assignee in Kansas. On September 14, 1966, Tanger advised an employee of assignee and an employee of Nevadair Company that the aircraft was not sold but was "out on demonstration". As a result of the foregoing payments and advice, assignee had no notice of the purported sale to petitioner until September 22, 1966, when Tanger confessed to an employee of assignee that he had sold the aircraft to petitioner.

The next day, September 23, 1966, assignee, Nevadair and respondent Norman Larson Company, Nevadair's parent corporation, removed the aircraft from petitioner's possession without his knowledge or consent and upon the advice of counsel.

As a result, petitioner brought this action against respondents and Tanger for recovery of the aircraft and for damages.

After trial to the court, sitting without a jury, judgment was entered declaring petitioner to be the owner and entitled to possession of the aircraft and ordering that petitioner take nothing against Tanger.

The Second Appellate District of the California Court of Appeal affirmed the trial court's judgment except as to an award for punitive damages of $1,000.00 for respondents' seizure of the airplane.

Upon appeal to the Supreme Court of California, the trial court's judgment was reversed and remanded to the trial court with directions to enter judgment for assignee establishing the priority of assignee's security interest in the airplane. The California Supreme Court was unanimous in holding that the system of recordation of title to aircraft under the Federal Aviation Act affects priorities under state law between the holder of a prior recorded security interest and a subsequent buyer who fails to record and fails to search the F.A.A. records to discover the security holder's prior claim.

ARGUMENT.

1. The Decision of the California Supreme Court Is Clearly Correct.

The decision of the California Supreme Court holds that one who first records his interest in an airplane under the federal recordation system prevails over a subsequent purchaser of the plane who consciously refused to check record title thereto, even though that buyer had earlier purchased another plane the title to which he checked with the FAA; even though that purchaser knew he could have checked the title to the plane in question for $3.50; and even though that purchaser was expressly found to be "familiar with the fact that title to aircraft and liens thereon were registered with the Federal Aviation Agency in Oklahoma City." The basis for the decision is found in §503 of the Federal Aviation Act of 1958, 49 U.S.C.A. §1403.[1]

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[1]Section 1403, provides in relevant part: "(a) The Administrator shall establish and maintain a system for the recording of each and all of the following: (1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States; (2) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to or any interest in, any specifically identified aircraft engine . . . or any specifically identified aircraft propellor . . . and also any assignment of amendment thereof or supplement thereto; . . . (b) The Administrator shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge, or satisfaction relating to any conveyance or other instrument recorded under said system. (c) No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, aircraft engine or engines, [or] propellers . . . against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator: . . . (d) Each conveyance or other instrument record-

The California Supreme Court correctly reasoned that:

> "* * * section 1403 provides a comprehensive system of recordation the purpose of which is to bring order to the field of aircraft titles and to protect the holders of substantial property interests in aircraft. Neither of those purposes is served if we apply state law in a manner virtually ignoring the existence of the federal system. If prior recorded interests are not protected against subsequent buyers who fail to search title, the federal policy in favor of the recordation of aircraft titles will be frustrated and subsequent purchasers . . . will cavalierly decline to investigate title so as to avoid 'actual notice' under Commercial Code section 9307."

The decision is consistent with this Honorable Court's denial of petition for certiorari in the in-point case of *International Atlas Services Inc. v. Twentieth Century Aircraft Co.*, (251 Cal. App. 2d 434, cert. den. 389 U.S. 1038). In that case, Atlas, a corporation in the business of repairing and maintaining aircraft engines, sued for claim and delivery of three aircraft engines and one QEC (quick engine change) unit attached to a DC6B airplane. The controversy developed out of the sale of the DC6B by Twentieth Century to President Airlines under a conditional sales

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ed by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation, . . . (f) The Administrator shall keep a record of the time and date of the filing of conveyances and other instruments with him in the order of their reception, in files to be kept for that purpose, and indexed according to . . . the identifying description of the aircraft, aircraft engine, or propeller, . . . and . . . the names of the parties to the conveyance or other instrument."

contract. President employed Atlas to service and maintain the aircraft. Its legal title remained in Twentieth pursuant to a conditional sales contract which was recorded with the FAA in Oklahoma City. When President defaulted in its payments under the contract, Twentieth Century repossessed the aircraft. At the time of repossession, the aircraft was equipped with the engines which Atlas had installed in the ordinary course of scheduled maintenance to which Atlas had retained legal title. Atlas claimed priority under California Commercial Code §9314 which gives a security interest in accessions to personal property, such as aircraft engines, priority over a security interest in the whole, such as an aircraft. The issue was priority of right between Twentieth and Atlas with respect to the engines. In affirming judgment for Twentieth, the Court stated (438-441):

> ". . . Nevertheless, we have concluded that *California law does not apply to this case, that the controversy is governed by the laws of the United States,* and that under federal law Twentieth Century must prevail. As we see it, general California law on the subject of title and liens to personal property in relation to component parts has been *superseded* by specific federal law with respect to aircraft. Section 503 of the Federal Aviation Act of 1958, derived from the Civil Aeronautics Act of 1938, provides for centralized registration and recordation of interests in aircraft with the Federal Aviation Agency." . . . (quoting 49 USCA §1403). (Emphasis added).
>
> "It seems clear that Congress has recognized the extreme mobility of large aircraft for which neither state nor national boundaries can delin-

eate or assure any fixed controls. Without some central system of recording ownership and other property interests in aircraft, security transactions involving aircraft engaged in continuous movement would amount to little more than attempts to control ownership of fish and game, which become objects of ownership only when taken. (Civil Code § 656). To bring order into the field of aircraft ownership and finance, the Federal government in a manner within its sphere set up a *comprehensive scheme of centralized recordation, which if properly used, provides adequate protection for all substantial property interests in large aircraft,* both *for the aircraft itself* and for its principal component parts. Under subsection 1403(a)(1) a security interest in the aircraft as a whole can be recorded. Under subsection 1403(a)(2) an interest in its specific engines and propellers can be recorded. A conveyance, lease, or *security instrument* recorded under subsection 1403(a) is fully valid against all persons from the time of its filing without further or other recordation. Under subsection 1403(c) a conveyance or instrument which could have been recorded but was not, is, until so recorded, invalid against a person without actual notice of the conveyance or instrument. . . . (Emphasis added)

"Here we have a complete and comprehensive system of recordation which necessarily supersedes inconsistent state law. Constitutionally, the federal government may be said to have fully occupied the field of recordation of interests in aircraft and of rights derived from recordation, and to have established paramount law in this area. Atlas

could have fully protected its rights in these engines and preserved a good title throughout the world by taking advantage of this national system of recordation and recording its interest in specifically numbered aircraft engines with the Federal Aviation Agency. Its failure to record in Oklahoma City its ownership of the engines prior to repossession of the aircraft by Twentieth Century resulted in the subordination of its interest in the engines to the recorded interest of Twentieth Century in the aircraft as a whole. The latter, by recording with the Federal Aviation Authority, established *a superior right to the aircraft*, its engines, and its propellers, effective against all other interests in the aircraft except known or recorded adverse interests. This *paramount interest* under federal law effectively *superseded* any inconsistent interest derived from state law." (Emphasis added).

The California Supreme Court's decision is required by the mandate of the Supremacy clause of the United States Constitution. Under the Federal Aviation Act enacted by Congress, a system has been provided for the recording of instruments which affect the title to, or any interest in, any civil aircraft (49 USCA §1400 *et seq.*). It is unlawful for any person to operate any aircraft eligible for registration if such aircraft is not registered by its owner with the FAA (49 USCA §1401). Instruments recorded with the FAA are valid as to all persons without further or other recordation (49 USCA §1403(d)).

That Federal law fully occupies the field of recordation and transfer of interests in aircraft cannot

be denied. It has been expressly held that by enactment of the Federal Aviation Act (49 USCA §§1400 *et seq.*):

> "The congress has preempted the field of conveyancing of interests in aircraft and portions thereof, to facilitate the control and promotion of air commerce. The power to do so may not be denied."
>
> *United States v. United Aircraft* (D.C. Conn.), 80 F. Supp. 52, 54.

Thus, the exclusive method of transferring interests in aircraft is by compliance with the Act. It has been so held in *Crescent City Aviation, Inc. v. Beverly Bank* (Ind.), 219 N.E. 2d 446, 448:

> "In the province of aviation, by the enactment of the Federal Aviation Act, Congress has provided *the only way* aircraft may be transferred and *the only way* in which liens upon aircraft may be duly recorded." (Emphasis added).

And *In Re Veteran's Air Express, Inc.* (D.C. N.J.), 76 F. Supp. 684, it is said: (688)

> "It is clear that the Congress has prescribed the only way in which aircraft may be transferred and in which liens upon aircraft may be duly recorded. *In this manner, all persons dealing with aircraft are upon full legal notice concerning possible liens and are charged with the duty of inquiry at the central recording office of the Civil Aeronautics Administration (now the FAA) with respect to any aircraft in which they might be concerned.*" (Emphasis added).

By express declaration of Article VI, clause 2, laws made pursuant to the United States Constitution are the Supreme Law of the land and are binding on every Court. The United States Supreme Court in *Free v. Bland,* 369 U.S. 665, 82 S. Ct. 1089 at 1092, 8 L. Ed. 2d 180, stated:

> "The relevant importance to the State of its own law is not material when there is a conflict with a valid federal law . . . [A]ny state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield."

Application of the California Commercial Code not only "interferes" with but is directly "contrary to federal law"—The Federal Aviation Act. This because the provisions of §§2403 and 9307 of the California Commercial Code serve to defeat the validity of the recordation provisions of the Act. Sections 2403 and 9307 of the California Commercial Code, therefore, must yield.

Numerous other jurisdictions have invoked the Supremacy Clause to uphold the recordation provisions of the Federal Aviation Act.[2]

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[2]California has said in *Pope v. National Aero Finance Co.,* 236 Cal. App. 2d 772, 733:

> "The recording and registration of documents to title of aircraft is governed by Federal statute rather than by State laws. . . . The Federal statute requiring recordation and providing for the effect to be given to instruments not recorded pursuant thereto *pre-empts any state laws* which might otherwise apply (citations)." (Emphasis added).

And in *International Atlas Services, Inc. v. Twentieth Century Aircraft Co.* (251 Cal. App. 2d 434, cert. den. 389 U.S. 1038), (440):

> "Constitutionally, the Federal Government may be said to have fully occupied the field of recordation of in-

The decision of the California Supreme Court upholds the recordation provisions of the Federal Aviation Act and thereby prevents throwing the aviation financing industry into a state of chaos. It affords

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terests in aircraft and of rights derived from recordation, and to have established *paramount* law in ths area." (Emphasis added).

In holding an unrecorded mechanic's lien invalid as against the interest of a conditional seller recorded pursuant to federal law, the Indiana Court in *Crescent City Aviation, Inc. v. Beverly Bank* (Ind.), 219 N.E. 2d 446 said (448):

> "Under the Supremecy Clause of the Constitution of the United States, Art. 6, Cl. 2, where the Congress, in a proper sphere of law, enacts legislation, the federal law becomes superior to that of the state. *Free v. Bland* (1962), 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180, 183."

In holding that §1403 of the Act pre-empts state law on the question of priority, the well-reasoned opinion in *Smith v. Eastern Airmotive Corp.* (N.J.), 240 A. 2d 17, concluded (25):

> " 'It is "familiar doctrine" that the federal policy 'may not be set at naught, or its benefits denied' by the law." Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229, 84 S. Ct. 784, 787, 11 L.Ed. 2d 661 (1964); rehearing denied 376 U.S. 793, 84 S.Ct. 1131, 12 L.Ed.2d 87 (1964).' "

For other cases holding that the Federal Aviation Act, and particularly its recordation provisions, is the supreme law of the land, see the following:

United States v. United Aircraft (D.C. Conn.), 80 F. Supp. 52, 54;

State Securities Co. v. Aviation Enterprises, Inc. (10th Cir.), 355 F. 2d 225, 229;

Pacific Financial Corp. v. Central Bank & Trust Co. (5 Cir.), 296 F. 2d 68, 71;

Continental Radio Company v. Continental Bank, etc. (Tex.), 369 S.W. 2d 359;

Blalock v. Brown (Ga.), 51 S.E. 2d 610, 9 A.L.R. 2d 476;

Aircraft Investment Corp. v. Fisher Flying Service, Inc. (La.), 183 So. 2d 441; writ refused 186 So. 2d 441;

Marsden v. Southern Flight Service, Inc. (D.C. N.C.), 227 F. Supp. 411;

Wilson v. Barnes (Mo.), 221 S.W. 2d 731, 732;

In re Veterans' Air Express, Inc. (D.C.N.J.), 76 F. Supp. 684;

James Talcott, Inc. v. Bank of Miami Beach (Fla.), 143 So.2d 657.

stability in an area of vital concern to the aviation industry as well as the banking and financing industry, lending upon the security of aircraft, and to the title search companies who report on the status of the FAA records regarding aircraft title. The protection of recordation avoids uncertainty and provides a buyer and a lender with adequate protection.

Certainly in petitioner's case, a $3.50 telephone call for a title check with the FAA would have avoided this entire litigation. Moreover, there exist firms in Oklahoma City engaged in the business of producing title reports from the official FAA records for financial institutions and buyers and sellers of aircraft. The services of these companies include issuing aircraft title reports and providing an escrow service so that simultaneous release and recordation of new instruments can be effectuated.[3]

2. There Is No Conflict of Appellate Decision.

There exists throughout the United States numerous appellate decisions holding, as did the California Supreme Court below, that questions of priority between conflicting interests in aircraft are governed by the laws of the United States rather than state law. Two recent California decisions are: *Pope v. National Aero Finance Co.*, 236 Cal. App. 2d 722; and *International Atlas Services Inc. v. Twentieth Century Air-*

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[3] *E.g.*, it is indicated in the Amicus Curiae brief filed in the California Supreme Court on behalf of Insured Aircraft Title Service, Inc., an Oklahoma Corporation, that said firm is engaged in producing title reports for more than 2,000 financial institutions who make loans secured by aircraft. This firm offers escrow service so that simultaneous release and recordation of new instruments can be accomplished (Brief, Amicus Curiae, p. 6).

craft Co., 251 Cal. App. 2d 434, cert. den. 389 U.S. 1038. These two cases rely upon four cases from other jurisdictions.[4]

Other appellate cases adopting the rule of priorities based upon the federal recordation provisions include *Smith v. Eastern Airmotive Corp.* (1968), 99 N.J. Super. 340 [240 A.2d 17]; *Crescent City Aviation, Inc. v. Beverly Bank* (1966), 139 Ind. App. 669 [219 N.E. 2d 446], and *Dawson v. General Discount Corporation* (1950), 82 Ga. App. 29 [60 S.E. 2d 653]. In the last-cited case, the plaintiff-mortgagee, who had acquired and recorded his security interest while the subject aircraft was in the possession of the conditional buyer, brought suit for possession of the plane against a subsequent purchaser who had failed to search title before his purchase. In affirming a judgment for the plaintiff-mortgage, the court concluded:

> "Constructive notice was given by the recording of the instrument with the Civil Aeronautics Authority under the provisions of Title 49, U.S.C.A., which provides that every conveyance so recorded shall be valid as to all persons. No further act was required of the plaintiff to protect his rights. The defendant, before purchasing, had the opportunity to ascertain the paramount outstanding title by checking the records of the Civil Aeronautics Authority." (*Id.* at p. 658.)

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[4]*Marsden v. Southern Flight Service, Inc.* (D.C.M.D.N.C.), 227 F. Supp. 411 (relied upon in the *Pope* case); *Continental Radio Co. v. Continental Bank & Trust Co.* (Tex.), 369 S.W. 2d 359 (relied upon in the *Pope* case); *James Talcott, Inc. v. Bank of Miami Beach* (Fla.), 143 So. 2d 657 (relied upon in the *Pope* case); and *United States v. United Aircraft* (1948, D.C. Conn.), 80 F. Supp. 52 (relied upon in the *International* case).

Petitioner is unable to provide a single appellate decision in the United States which is in conflict with the decision of the California Supreme Court below. Instead, he has cited three Federal District Court cases,[5] each of which is factually distinguishable from the case at bar.

However, since only one of the three, *Northern Illinois Corp. v. Bishop Distributing Co.* (W.D. Mich. 1968), 284 F. Supp. 121, stands alone as the only case, trial or appellate, in the United States invoking the Commercial Code in the face of the Federal Aviation Act, it alone bears discussion. *Northern Illinois* is distinguishable factually from the present case in that there was no evidence, as in the case at bar, that the purchaser of the aircraft in question was a "Bird Dog", had a vendor's exemption certificate or a sales tax permit, had made a title check with the F.A.A. in connection with a previous purchase of an airplane and was aware that he could check title for $3.50 via a telephone call to Oklahoma City. There was no finding, as in the instant case, that the purchaser of the aircraft was familiar with the fact that title to aircraft and liens thereon were registered with the F.A.A. and that the purchaser made no inquiry of the F.A.A. as to the status of title to the aircraft purchased. Further, the *Northern Illinois* decision presupposes that "both plaintiff and defendants are innocent parties to a very unhappy chain of events" (284 F. Supp. at. 125). Equal innocence of the parties is lacking in the present case. Assignee had no knowledge of Tanger's

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[5]*Aircraft Investment Corp. v. Pezzani & Reid Equip. Co.*, 205 F. Supp. 80 (E.D. Mich. 1962); *Texas National Bank of Houston v. Aufderheide;* 235 F. Supp. 599 (E.D. Ark. 1965); and *Northern Illinois Corp. v. Bishop Distributing Co.*, 284 F. Supp. 121 (W.D. Mich. 1968).

purported sale of the aircraft to petitioner until long after it had occurred. Petitioner, on the other hand, as a party to the transactions, had personal knowledge of it. He knew that for $3.50 he could have checked title to the plane. Instead, with careless indifference, he elected to reject his "last clear chance". Accordingly, although this case presents "a very unhappy chain of events", the parties could hardly be termed equally innocent.

It is submitted, therefore, that if any conflict does exist regarding the priorities given by the Federal Aviation Act, it exists at the trial court level only, and is not of sufficient magnitude to warrant this Court's consideration.

Conclusion.

The decision of the California Supreme Court upholds the federal policy to foster recordation and to protect recorded interests. Petitioner asks this Court to abandon such policy in favor of a rule invoking conflicting state law which would give him priority in spite of the fact that he chose not to undertake a simple, convenient title search which would have revealed assignee's security interest recorded some eight months earlier. Denial of this petition will prevent the unjust result petitioner seeks.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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